SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 954

THE UNITED STATES OF AMERICA, APPELLANT

vs.

JAMES C. PETRILLO

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

INDEX

	Original	Print
Record from D. C. U. S., Northern District of Illinois	1	1
Caption [omitted in printing]	1	1
Criminal information	2	1
Motion to dismiss the information	5	2
Opinion, La Buy, J	6	3
Order entered December 2, 1946, dismissing the information and discharging the defendant	11	9
Notice of appeal	12	9
Designation of record on appeal	20	10
Transcript of docket entries	21	11
Clerk's certificate [omitted in printing]	24	12
Statement of points to be relied upon and designation of record	25	12
Order noting probable jurisdiction	27	13

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1 [Caption omitted.]

2 In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 46-CR-357, Vio.: Section 506, Federal Communications Act of 1934, as Amended

UNITED STATES OF AMERICA

vs.

JAMES C. PETRILLO

Criminal information

Filed June 13, 1946

The United States Attorney charges:

That at all times mentioned herein the Drovers Journal Publishing Company, Inc. (hereinafter referred to as the Licensee), was an Illinois corporation and the owner and operator of a licensed radio broadcasting station known as Radio Station WAAF, located in Chicago, Illinois.

That for several years last past up to, on or about, May 28, 1946, in connection with the operation of its radio broadcasting facilities, the licensee employed certain persons who were sufficient and adequate in number to perform all of the actual services needed by said licensee in connection with the conduct of its broadcasting business.

That notwithstanding the premises aforesaid, one James C. Petrillo, President of the Chicago Federation of Musicians, on or about May 28, 1946, at Chicago, Illinois, wilfully, by the use of force, intimidation, duress and by the use of other means, did attempt to coerce, compel and constrain said licensee to employ and agree to employ, in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services, in the following manner, to wit:

3 (1) By directing and causing three musicians, members of the Chicago Federation of Musicians, theretofore employed by the said licensee in connection with the conduct of its broadcasting business, to discontinue their employment with said licensee;

(2) By directing and causing said three employees and other persons, members of the Chicago Federation of Musicians, not to accept employment by said licensee; and,

(3) By placing and causing to be placed a person as a picket in front of the place of business of said licensee.

J. Albert Woll,
J. ALBERT WOLL,
United States Attorney.

4 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

Wm. J. Connor, being first duly sworn, on his oath, deposes and says that the facts stated in the foregoing Information are true.

WM. J. CONNOR.

Subscribed and sworn to before me this 13th day of June A. D. 1946.

[SEAL] ISADORE KASTEL,
Deputy Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division.

5 In the District Court of the United States

Motion to dismiss the information

Filed July 5, 1946

The defendant moves that the Information be dismissed on the following grounds:

The information does not state facts sufficient to constitute an offense against the United States because it purports to charge a violation of Section 506 of Title V of the Communications Act of 1934, as Amended, approved April 16, 1946, Public Law No. 344, 79th Congress, Second Session, which

(a) contravenes the First Amendment to the Constitution of the United States in that it abridges freedom of speech;

(b) is repugnant to the Fifth Amendment to the Constitution of the United States, and particularly the due process clause thereof, in that it defines a crime in terms that are excessively vague, in that it denies equal protection of the law and in that it denies liberty of contract;

(c) violates the Thirteenth Amendment to the Constitution of the United States in that it imposes involuntary servitude;

(d) is contrary to the Tenth Amendment to the Constitution of the United States in that it is a Congressional exercise of power not delegated to the United States by the Constitution.

Dated July 15, 1946.

Jos. A. Padway,
JOSEPH A. PADWAY,
736 Bowen Bldg., Washington, D. C.,
Henry Kaiser,
HENRY KAISER,
736 Bowen Bldg., Washington, D. C.,
Henry A. Friedman, by Jos. A. Padway,
HENRY A. FRIEDMAN,
521 Fifth Ave., New York, N. Y.,
David Katz,
DAVID KATZ,
175 W. Washington St., Chicago, Ill., State 0063,
Counsel for the Defendant.

6 In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 46 CR 357

UNITED STATES OF AMERICA

vs.

JAMES C. PETRILLO

Opinion

DECEMBER 2, 1946.

The information filed herein charges a violation of Section 506 of the Federal Communications Act of 1934, as amended. It charges that the licensee of radio station WAAF, located in Chicago, Illinois, for several years to on or about May 28, 1946, employed certain persons who were sufficient and adequate in number to perform all of the actual services needed by said licensee in connection with the operation of its radio broadcasting facilities; that notwithstanding the premises, the defendant, James C. Petrillo, President of the Chicago Federation of Musicians, on or about May 28, 1946, at Chicago, Illinois, wilfully by the use of force, intimidation, duress and by the use of other means, did attempt to coerce, compel and constrain said licensee to employ and agree to employ in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services, in the following manner, to-wit:

(1) By directing and causing three musicians, members of the Chicago Federation of Musicians, theretofore employed by the said licensee in connection with the conduct of its broadcasting business, to discontinue their employment with said licensee;

(2) By directing and causing said three employees and other persons, members of the Chicago Federation of Musicians, not to accept employment by said licensee; and

(3) By placing and causing to be placed a person as a picket in front of the place of business of said licensee.

The information, therefore, charges that coercive practices employed by the defendant were only with reference to subsection (a) (1) of Section 506. The pertinent portion of the section is as follows:

"SEC. 506. (a) It shall be unlawful, by the use of express or implied threat of the use of force, violence, intimidation, or duress, or by the use of express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel or constrain a licensee—

"(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services.

* * * * *

"(c) The provisions of subsection (a) of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed.

"(d) Whoever wilfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by an imprisonment for not more than one year or by a fine of not more than $1,000, or both."

7 The defendant has moved to dismiss the information on the ground that Section 506 of Title V of the Communication Act, added thereto by an Act of 1946, contravenes the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States.

The court considers first the contention of defendant that Section 506 violates the due process of law protected under the Fifth Amendment in that it is so framed as to create indefiniteness and uncertainty in the definition of a criminal offense. The portion of the section here involved imposes a criminal penalty upon the use or threat to use pressure upon a licensed operator of a radio station

"to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employes needed by such licensee to perform actual services * * *"

There is no means, or guide, or standard by which the defendant may know "the number of employees needed." This is established by the licensee without prior knowledge upon the part of the person subjected to prosecution for violation of the section.

Such a provision in a criminal statute violates the established principle that—

"a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Company, (1926) 269 U. S. 385.

A similar statement was more recently made in Lanzetta v. New Jersey, (1939) 306 U. S. 451, and a detailed analysis of other cases is found in 83 Lawyers' Edition, Annotation, pages 893–921.

The words "wilfully" used in paragraph (d) of this section does not make definite the undefined offense. This view is not contradictory to that of Mr. Justice Douglas in Screws v. Douglas, (1945) 325 U. S. 91, for he stated:

"* * * But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of the law. * * *" (P. 104.)

In that case the defendants had knowledge that they were committing an unlawful act, but under Section 506 here involved defendant cannot know whether he is doing that which the statute prohibits or is acting lawfully. This lack of knowledge is not due to ignorance as to existence of the statute. His guilt or innocence is subject wholly to the whim of others, and his position is that of the defendants in United States v. Local 807 of Teamsters, (1942) 315 U. S. 521, 532, regarding whom the United States Supreme Court said:

"The state of the mind of the truck owner cannot be decisive of the guilt of these defendants."

Life and liberty may not be imperilled by or be subject to such a frail and uncertain device as one man's opinion against another's. The will of an individual to make an act a crime or not, depending upon his own judgment, is abhorrent to our form of government.

It is the court's opinion, therefore, that subsection (1) of Section 506 (a) is patently defective in its failure to define with reasonable certainty the crime charged.

There are, however, other fundamental deficiencies in the act which must be considered.

8 Congress has plainly stated in this statute that if a licensee can be persuaded by means which place no constraint or coercion upon the licensee then the acts of the parties and the results accomplished are not prohibited. It is legal and not prohibited by any law for the licensee to employ more persons than it needed, without any agreement with or, in fact, against the desires of its employees or its representatives. The employment of more persons than are needed by the licensee is not condemned in this legislation; such act is not defined to be an evil which must be remedied; such conduct is not denounced or proclaimed to be illegal in any sense through all the wording of the statute. The only time it becomes a crime under this statute is when the employer refuses to agree. If an employee persists in trying to demonstrate his demand to other employees by means of a picket it becomes a crime. But if the employer agrees to hire fifty more employees than are needed, it is not a criminal offense because of the decision of the employer.

The information charges that one of the means employed by defendant to enforce his request that more persons be employed by the licensee was the "placing and causing to be placed a person as a picket in front of the place of business of said licensee." Can the hiring of additional employees which can be done legally by agreement of the licensee and the union, or by the licensee alone, be constitutionally denounced as illegal when done by the right of free speech as manifested by peaceful picketing?

There is in this case no charge of violence in picketing and therefore the placing of a picket must be regarded by this court as peaceful picketing. The Supreme Court of the United States in Carlson v. California, (1940) 310 U. S. 106 said:

"* * * publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state."

It is this fundamental right that is here challenged as an unlawful means to procure the accomplishment of an admittedly legal objective. The court is of the opinion, therefore, that picketing where not accompanied by any force or violence, used merely for the purpose of disseminating the views of defendant and the members of the musicians union is a manifestation of the exercise

of the right of free speech and cannot be defined as illegal except under circumstances which warrant a restraint upon freedom of speech or where it is used for some unlawful purpose. It has been repeatedly and universally held that peaceful picketing is a form of speech and discussion that cannot under the First or Fourteenth Amendments be curtailed by any legislative enactment. Thornhill v. Alabama, 1940, 310 U. S. 88.

The information further charges attempts to coerce, compel and constrain employment by means of (1) causing three musicians to discontinue their employment; and (2) causing three musicians not to accept employment by such licensee.

There is no doubt as to the constitutional right to discontinue an employment or to refuse such employment. The Thirteenth Amendment accomplishes the purpose

"to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude." Bailey v. Alabama, (1911) 219 U. S. 219.

As was said in Carpenters' Union v. Citizens Committee, (1928) 33 Ill. 225:

"Every man has a full freedom in the disposal of his labor according to his will, and workmen have a right to organize for the purpose of promoting their common welfare by lawful means. They may impose any condition of their employment which they may regard as beneficial to them, and, if not bound by contract, may abandon their employment at any time, either singly or in a body, with or without cause. They have the right to a free and open market in which to dispose of their labor."

9 Under the Thirteenth Amendment the right of any worker to leave his employment at will or for no reason at all is protected and that right is inviolate. The freedom to quit and refuse to undertake work may as readily be exercised through a group organization as individually.

It is further contended the statute violates the Fifth Amendment because it denies equal protection of the laws. It is fully recognized that there is no specific constitutional right to equal protection of the laws which restricts Congress; but it is true that "discriminatory legislation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment." Detroit Bank v. United States, (1943) 317 U. S. 329.

The Circuit Court of Appeals for this Circuit recently said:

"Congress may not arbitrarily classify an act as something, the attributes of which it does not partake, Heiner v. Donnan, 285 U. S. 312, but it may always designate an act as coming within a certain category if in its inherent nature it may reasonably be said

to be endowed with the qualities of such category. In re Chicago, R. I. & P. Ry. Co., (1937) 90 F. (2d) 312, cert. den. Bankers Trust Co. v. Wise (1937) 302 U. S. 717.

The Fifth Amendment imposes a restriction upon Congress, not specific, but equally effective as to arbitrary classification. The guarantee of peaceful picketing is found in the specific guarantee of freedom of speech by the First Amendment; the guarantee of freedom to withdraw from employment or refuse to accept employment is found in the specific guarantee of the Fifth and Thirteenth Amendments.

This statute could be used to deprive the members of the musicians union of the right to quit work collectively as a means of enforcing their demands with reference to the making of a new contract. All other employees of this country have the right to quit work collectively in order to use their bargaining power; they have the right to strike in order to enforce their demands.

Broadcasting station employees are placed in a class separate and apart from those of all other employees in the United States. The statute does not apply to employees who are engaged in communication such as telephone or telegraph companies, but is definitely limited in its application to broadcasting station employees and no others. As a result the broadcasting station employees are singled out and held to a more rigid rule than any other employees; they have not the same rights and privileges as other employees; they are penalized and prohibited in their contractual negotiations, while other employees enjoy the right which is denied them. A penalty which applies uniquely to broadcasting station employees and no others; a prohibition which relates solely to contracts between these same employees and no others; an inhibition which defines lawful acts as unlawful when applied to these employees and no others cannot survive the constitutional test. This segregation and classification plainly falls within the arbitrary group of class legislation.

The Court finds it necessary to hold that the statute here involved in the application here sought to be made violates the Fifth Amendment because of indefiniteness and uncertainty in the definition of a criminal offense; violates the First Amendment by its restriction upon freedom of speech by peaceful picketing; violates the Fifth and Thirteenth Amendment by its restriction upon employment of labor; and violates the Fifth Amendment by an arbitrary classification as between employers and employees and as to other communication industries.

Whether or not the objectives sought to be attained by this statute are or are not economic evils which should be restrained or suppressed are questions not within the province of this court. This court does not hold that Congress is powerless to act or that

the declared objectives of this law are beyond the reach of
10 federal legislative control. The only question before the court is the constitutional aspect of this statute as it was written by Congress. On this question the court is of the opinion that this statute is unconstitutional for the reasons above stated.

An order may be entered dismissing the information and discharging the defendant.

Walter J. LaBuy,
WALTER J. LABUY,
Judge, United States District Court.

11 In the District Court of the United States for the Northern District of Illinois, Eastern Division

Present: Honorable WALTER J. LA BUY, District Judge

No. 46-CR-357

UNITED STATES OF AMERICA
vs.
JAMES C. PETRILLO

Order dismissing information

DECEMBER 2, 1946.

This cause coming on for disposition on the defendant's motion to dismiss the Information filed herein against him come the parties by their attorneys respectively and the Court being fully advised in the premises it is

Ordered that the Criminal Information filed herein be and the same is hereby dismissed and that the defendant James C. Petrillo be and he is hereby discharged from further prosecution under said Information.

12 In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 46-CR-357

UNITED STATES OF AMERICA, PLAINTIFF
v.
JAMES C. PETRILLO, DEFENDANT

Notice of appeal

Filed Dec. 26, 1946

The United States of America, by George T. Washington, Acting Solicitor General, and Theron L. Caudle, Assistant Attorney

General, hereby appeals to the Supreme Court of the United States from the judgment of the United States District Court for the Northern District of Illinois (Eastern Division), entered December 2, 1946, dismissing the information against the defendant, James C. Petrillo, which charged him with having violated the Act of April 16, 1946, in that he wilfully attempted to coerce the licensee of a radio station to employ persons not needed by said licensee to perform actual services, on the ground that the statute is unconstitutional.

Dated December 26, 1946.

GEORGE T. WASHINGTON,
Acting Solicitor General,
Department of Justice, Washington, D. C.
THERON LAMAR CAUDLE,
Assistant Attorney General,
Department of Justice, Washington, D. C.

[Certificate of Mailing attached.]

13 CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 27th day of December 1946, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I did cause to be mailed a copy of the foregoing Notice of Appeal to the following attorneys of record: David Katz, 175 W. Washington St., Chicago 2, Ill.

[SEAL] ROY H. JOHNSON,
Clerk.

14–20 In the District Court of the United States

[Title omitted.]

Designation of record on appeal

Filed December 26, 1946

The Clerk will please prepare and certify to the Clerk of the Supreme Court of the United States a transcript of the record on appeal in this case and include therein the following:

1. Transcript of docket entries.
2. The criminal information.
3. Motion of defendant to dismiss the information.
4. The opinion of the district court, entered December 2, 1946.

5. The order of the district court, entered December 2, 1946, dismissing the information and discharging the defendant.
6. Notice of appeal.
7. Statement as to jurisdiction.
8. This designation.

THERON LAMAR CAUDLE,
Assistant Attorney General,
Department of Justice, Washington, D. C.

21 In United States District Court

THE UNITED STATES
vs.
JAMES C. PETRILLO

Case No. 46CR357

Attorneys—For U. S.: J. Albert Woll. For defendant: Jos. A. Padway and Henry Kaiser, 736 Bowen Bldg., Washington, D. C. (5); Henry A. Friedman, 521 Fifth Ave., New York City; David Katz, 175 W. Washington St., Chicago, Ill.

Vio: Section 506 Federal Communications Act of 1934 as amended.

22

Date	Proceedings	Clerk's fees	
		Plaintiff	Defendant
6-13-46	Filed criminal information, JS2	$15	U. S.
6-13-46	Order to issue summons returnable at 10 a. m. Friday, June 14, 1946, before Judge LaBuy—Barnes, J		
6-13-46	Issued summons and copy, D		
6-14-46	Filed bond		
6-14-46	Deft given until July 15, 1946, to file motions raising defenses or objections, supporting brief to be filed on or before Aug. 5, 1946, and reply brief to be filed on or before Sept. 9, 1946. Bond fixed at $1,000, LaBuy, J., D		
6-20-46	Filed summons retd. executed, $2, D		
7-15-46	Filed motion to dismiss the information by defendant, w		
8- 2-46	By stipulation deft's brief in support of motion to dismiss to be filed by Aug. 15, 1946, answering brief by Sept. 19, 1946, g		
8- 2-46	(Draft) Filed stipulation, Campbell, J., g		
8- 2-46	Mailed notice to attorneys, g		
8-15-46	Appendix to memorandum brief in support of motion to dismiss, filed		
8-15-46	Memorandum brief in support of motion to dismiss, filed		
9-11-46	Filed stipulation		
9-11-46	By stipulation time for Government to file brief in opposition to motion to dismiss extended from Sept. 19 to Sept. 30, 1946, draft—LaBuy, J		
	Mailed notice to attorneys Sept. 11, 1946, D		
9-30-46	Filed brief in opposition to motion to dismiss and hearings before the committee on interstate and foreign commerce, etc., with appendix "C"		
10- 8-46	Leave given deft to file reply brief in re motion to dismiss within 3 days and arguments on said motion set for Nov. 4, 1946, LaBuy, J		
	Mailed notice to attorneys Oct. 8, 1946, D		
10-11-46	Filed notice of motion		
10-11-46	Filed petition of American Civil Liberties Union		
10-11-46	Motion of American Civil Liberties Union for leave to filed brief as amicus curiae denied, LaBuy, J., D		
10-31-46	Filed supplemental memorandum on separability		
10-31-46	By agreement leave given Government to file instanter supplemental memorandum, LaBuy, J		
	Mailed notice to attorneys Oct. 31, 1946, D		

Date	Proceedings	Clerk's fees	
		Plaintiff	Defendant
23			
11- 4-46	Arguments heard and concluded on motion to dismiss and said motion taken under advisement—LaBuy, J		
	Mailed notice to attorneys Nov. 5, 1946, D		
12- 2-46	Filed opinion		
12- 2-46	Enter order dismissing the information and discharging the defendant, LaBuy, J., JS3		
	Mailed notice to attorneys Dec. 2, 1946, D		
12-17-46	Filed transcript of proceedings had before Judge LaBuy on Oct. 11, 1946, d		
12-26-46	Filed notice of appeal	5	U. S.
12-26-46	Filed designation of record on appeal		
12-26-46	Mailed copy of notice of appeal with statement of docket entries to Supreme Court of the U. S., Washington, D. C., B		
12-27-46	Mailed copy of notice of appeal to David Katz, 175 W. Washington, Chicago 2, Ill		
12-27-46	Filed proof of service of designation of record, w		
12-26-46	Filed statement as to jurisdiction, w		

24 [Clerk's certificate to foregoing transcript omitted in printing.]

25 In the Supreme Court of the United States

October Term, 1946

No. 954

Statement of points to be relied upon and designation of record

Filed February 5, 1947

Pursuant to Rule 13, paragraph 9, of the rules of this Court, the appellant states that it intends to rely on the following points. The district court erred:

1. In granting the motion to dismiss the indictment.

2. In holding unconstitutional the Act of April 16, 1946, Public, No. 344, 79th Cong., 2d sess., 47 U. S. C. 506.

3. In holding that the statute imposes a standard of criminal liability too vague and uncertain to satisfy the due-process clause of the Fifth Amendment.

4. In holding that, insofar as it prohibits the enforcement of a demand for the employment of additional persons by means of peaceful picketing, the statute violates the right of free speech guaranteed by the First Amendment.

5. In holding that any penalization of peaceful picketing necessarily constitutes a violation of the First Amendment.

26 6. In holding that, insofar as the statute prohibits enforcement of a demand for the employment of additional persons by causing employees to discontinue or refuse employ-

ment by the licensee of a radio station, the statute violates the Thirteenth Amendment.

7. In holding that the punishment of a person who causes others not to perform labor infringes that person's rights under the Thirteenth Amendment.

8. In holding that any penalization of the right to strike or call a strike necessarily constitutes a violation of the Thirteenth Amendment.

9. In holding that the statute violates the due process clause of the Fifth Amendment by arbitrarily treating employees of broadcasting stations as a class and denying to them rights afforded employees in other industries.

Appellant deems the entire record as filed in the above-entitled case, necessary for the consideration of the points relied upon.

George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.
HENRY KAISER.

Service acknowledged this 5 day of February 1947.

[File endorsement omitted.]

27 Supreme Court of the United States

No. 954. October Term, 1946

Order noting probable jurisdiction

March 3, 1947.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:] Enter the Attorney General. File No. 51818. Northern Illinois, D. C. U. S. Term No. 954. The United States of America, Apellant, vs. James C. Petrillo. Filed January 27, 1947. Term No. 954 O. T. 1946.

U. S. GOVERNMENT PRINTING OFFICE 1947

No. 954

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

vs.

JAMES C. PETRILLO

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 46CR357

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES C. PETRILLO, DEFENDANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 37 (a) (1) of the Federal Rules of Criminal Procedure and Rule 12 of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on December 2, 1946, dismissing the information filed against the defendant.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C. Supp. V 682, commonly known as the Criminal Appeals

730638—47——1

Act, and by Section 238 of the Judicial Code (28 U. S. C. 345).

STATUTE INVOLVED

The statute involved, the so-called Lea Bill (Act of April 16, 1946, Pub. No. 344, 79th Cong., 2d ses., 47 U. S. C. A. 506), was passed "To amend title V of the Communications Act of 1934 [47 U. S. C. 151, *et seq.*] so as to prohibit certain coercive practices affecting radio broadcasting." So far as pertinent it provides as follows:

> COERCIVE PRACTICES AFFECTING BROADCASTING
>
> SEC. 506. (a) It shall be unlawful, by the use of express or implied threat of the use of force, violence, intimidation, or duress, or by the use of express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—
>
> (1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services;
>
> * * * * * *
>
> (c) The provisions of subsection (a) * * * of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right hereto-

fore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed.

(d) Whoever wilfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both.

(e) As used in this section the term "licensee" includes the owner or owners, and the person or persons having control or management, of the radio station in respect of which a station license was granted.

THE ISSUE AND RULING BELOW

An information was filed against the defendant in the United States District Court for the Northern District of Illinois charging a violation of the Act of April 16, 1946, *supra*. The information alleged that for several years prior to May 28, 1946, the licensee of radio station WAAF in Chicago, Illinois, employed persons who were sufficient and adequate in number to perform all of the services needed by the licensee in connection with its broadcasting business; that on May 28, 1946, the defendant, president of the Chicago Federation of Musicians,

> * * * * wilfully, by the use of force, intimidation, duress and by the use of other means, did attempt to coerce, compel and constrain said licensee to employ and

agree to employ, in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services, in the following manner, to wit:

(1) By directing and causing three musicians, members of the Chicago Federation of Musicians, theretofore employed by the said licensee in connection with the conduct of its broadcasting business, to discontinue their employment with said licensee;

(2) By directing and causing said three employees and other persons, members of the Chicago Federation of Musicians, not to accept employment by said licensee; and,

(3) By placing and causing to be placed a person as a picket in front of the place of business of said licensee.

The defendant moved to dismiss the information on the ground that the statute on which it is based contravenes the First, Fifth, Tenth, and Thirteenth Amendments to the Constitution. The district court granted the motion to dismiss, holding the statute unconstitutional on the following grounds:

1. The portion of the statute here involved subjecting to a criminal penalty any person who coerces or threatens to coerce a licensed operator of a radio station to employ "any person or persons in excess of the number of employees

needed by such licensee to perform actual services," imposes a standard of criminal liability too vague and uncertain to satisfy the due process clause of the Fifth Amendment in that the lawfulness or unlawfulness of the prohibited acts depends upon the state of mind of the licensee.

2. Insofar as the statute prohibits the enforcement of a demand for the employment of additional persons by means of peaceful picketing, it violates the right of free speech guaranteed by the First Amendment.

3. Insofar as the statute prohibits enforcement of such a demand by causing employees to discontinue or refuse employment by the licensee, it violates the Thirteenth Amendment.

4. The statute contravenes the due process clause of the Fifth Amendment by arbitrarily treating employees of broadcasting stations as a class and denying to them rights afforded employees in other industries.

Since all of the grounds of the district court's decision relate to the constitutionality of the statute on which the information is based, the ruling is subject to review by the Supreme Court on direct appeal. *United States* v. *Classic*, 313 U. S. 299, 309; *United States* v. *Darby*, 312 U. S. 100, 109.

THE QUESTION IS SUBSTANTIAL

The statute involved resulted from a number of congressional investigations, extending from

1942 to 1945, of the activities of the American Federation of Musicians in connection with radio broadcasting.[1] It represents the deliberate judgment of Congress as to the existence of an evil affecting the broadcasting system of the nation and as to the best method of remedying such evil. The very fact that the decision here nullifies an act which Congress deemed necessary for the welfare of the nation, in itself establishes the substantiality of the question involved.

Furthermore, the district court has decided important questions of constitutional interpretation contrary to established principles.

1. The prohibition of the statute against coercion of a radio licensee to employ persons "in excess of the number * * * needed to perform actual services" is not as indefinite as the definitions of other offenses in statutes sustained by this Court. See *United States* v. *Ragen*, 314 U. S. 513, *Kay* v. *United States*, 303 U. S. 1, 8–9. Moreover, the act punishes only persons who "wilfully" perform the prohibited acts, and it is well settled that "the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise

[1] Hearings before a Subcommittee of the Senate Committee on Interstate Commerce, 77th Cong., 2d sess., pursuant to S. Res. 286, Use of Mechanical Reproduction of Music (1942); Hearings before the same committee, 78th Cong., 1st sess., unprinted (1943); Hearings before the House Committee on Interstate and Foreign Commerce, 79th Cong., 1st sess., on S. 63 and H. R. 1648 (1945).

render a vague or indefinite statute invalid." *Screws* v. *United States*, 325 U. S. 91, 101–104.

2. The information involved in this case did not charge that the defendant refrained from working; it charged that he attempted to coerce the licensee of the radio station by causing others to discontinue their employment by the licensee. In so far as the decision holds that a statute which punishes a person who causes others not to perform labor infringes that person's rights under the Thirteenth Amendment, it has manifestly misconstrued the scope of the Thirteenth Amendment.

Furthermore, the decision of the district court misconstrues the Thirteenth Amendment as guaranteeing an absolute right to strike. The fact that a man may not be forced against his will to perform labor for another does not mean that he has an absolute right to agree with others to refrain from working for a particular employer with the avowed purpose of requiring the very same employer to employ him under different conditions. In this statute Congress has only made unlawful coercive acts, including strikes, for specified purposes. The Supreme Court has held that the right to strike is not absolute and that a strike for an unlawful object may be enjoined. *Dorchy* v. *Kansas*, 272 U. S. 306. That decision and many others establish that the purpose of a strike may be unlawful even though

it would not be illegal for the employer voluntarily to agree to what is demanded.

3. In holding the statute unconstitutional on the ground that it prohibits peaceful picketing, the district court failed to take into consideration the fact that the statute does not prohibit picketing as such; it prohibits coercion by any means, and the means include picketing. Picketing is no more entitled to constitutional protection than other forms of speech, and when it clearly and immediately is designed to achieve an end which Congress has legitimately made unlawful it may be prohibited. See *Schenck* v. *United States*, 249 U. S. 47, 52; *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797. Furthermore the fact that picketing is peaceful does not establish that it is not coercive. Picketing may be not merely a means to persuade; it may constitute an actual threat and use of force, just as a letter or oral speech may constitute a threat or use of force. The First Amendment does not protect speech which amounts to coercion designed to achieve an object which Congress has declared to be unlawful.

4. The decision of the district court is also erroneous in holding that the statute represents an arbitrary denial of equal protection of the laws to employees of radio stations. The radio industry is sufficiently unique to be subject to special regulation in many of its aspects. Hence, the congressional determination that the practices against which the statute was aimed constitute

particular evils in relation to the broadcasting industry, rather than in other industries in which such practices may or may not exist, cannot be deemed arbitrary or unreasonable.

Appended hereto is a copy of the opinion rendered by the District Court on December 2, 1946.

Respectfully submitted.

George T. Washington.
GEORGE T. WASHINGTON,
Acting Solicitor General.

Theron Lamar Caudle,
THERON LAMAR CAUDLE,
Assistant Attorney General.

In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 46 CR 357

UNITED STATES OF AMERICA
vs.
JAMES C. PETRILLO

DECEMBER 2, 1946.

OPINION

The information filed herein charges a violation of Section 506 of the Federal Communications Act of 1934, as amended. It charges that the licensee of radio station WAAF, located in Chicago, Illinois, for several years to on or about May 28, 1946, employed certain persons who were sufficient and adequate in number to perform all

of the actual services needed by said licensee in connection with the operation of its radio broadcasting facilities; that not withstanding the premises, the defendant, James C. Petrillo, President of the Chicago Federation of Musicians, on or about May 28, 1946, at Chicago, Illinois, wilfully, by the use of force, intimidation, duress and by the use of other means, did attempt to coerce, compel and constrain said licensee to employ and agree to employ in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services, in the following manner, to-wit:

(1) By directing and causing three musicians, members of the Chicago Federation of Musicians, theretofore employed by the said licensee in connection with the conduct of its broadcasting business, to discontinue their employment with said licensee;

(2) By directing and causing said three employees and other persons, members of the Chicago Federation of Musicians, not to accept employment by said licensee; and

(3) By placing and causing to be placed a person as a picket in front of the place of business of said licensee.

The information, therefore, charges that coercive practices employed by the defendant were only with reference to subsection (a) (1) of Sec-

tion 506. The pertinent portion of the section is as follows:

> SEC. 506. (a) It shall be unlawful, by the use of express or implied threat of the use of force, violence, intimidation, or duress, or by the use of express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel or constrain a licensee—
>
> (1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services.
>
> * * * * * * *
>
> (c) The provisions of subsection (a) of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed.
>
> (d) Whoever wilfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by an imprisonment for not more than one year or by a fine of not more than $1000, or both.

The defendant has moved to dismiss the information on the ground that Section 506 of Title V of the Communication Act, added thereto by an Act of 1946, contravenes the First, Fifth,

Tenth and Thirteenth Amendments to the Constitution of the United States.

The court considers first the contention of defendant that Section 506 violates the due process of law protected under the Fifth Amendment in that it is so framed as to create indefiniteness and uncertainty in the definition of a criminal offense. The portion of the section here involved imposes a criminal penalty upon the use or threat to use pressure upon a licensed operator of a radio station

> to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons *in excess of the number of employes needed by* such licensee to perform actual services * * *

There is no means, or guide, or standard by which the defendant may know "the number of employees needed." This is established by the licensee without prior knowledge upon the part of the person subjected to prosecution for violation of the section.

Such a provision in a criminal statute violates the established principle that—

> a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Connally* v. *Gen-*

eral Construction Company, (1926) 269 U. S. 385.

A similar statement was more recently made in *Lanzetta* v. *New Jersey*, (1939) 306 U. S. 451, and a detailed analysis of other cases is found in 83 Lawyers' Edition, Annotation, pages 893–921.

The word "wilfully" used in paragraph (d) of this section does not make definite the undefined offense. This view is not contradictory to that of Mr. Justice Douglas in *Screws* v. *Douglas*, (1945) 325 U. S. 91, for he stated:

> * * * But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of the law. * * * (P. 104.)

In that case defendants had knowledge they were committing an unlawful act, but under Section 506 here involved defendant cannot know whether he is doing that which the statute prohibits or is acting lawfully. This lack of knowledge is not due to ignorance as to existence of the statute. His guilt or innocence is subject wholly to the whim of others, and his position is that of the defendants in *United States* v. *Local 807 of Teamsters*, (1942) 315 U. S. 521, 532, regarding whom the United States Supreme Court said:

> The state of the mind of the truck owner cannot be decisive of the guilt of these defendants.

Life and liberty may not be imperilled by or be subject to such a frail and uncertain device as one man's opinion against another's. The will of an individual to make an act a crime or not, depending upon his own judgment, is abhorrent to our form of government.

It is the court's opinion, therefore, that subsection (1) of Section 506 (a) is patently defective in its failure to define with reasonable certainty the crime charged.

There are, however, other fundamental deficiencies in the act which must be considered.

Congress has plainly stated in this statute that if a licensee can be persuaded by means which place no constraint or coercion upon the licensee then the acts of the parties and the results accomplished are not prohibited. It is legal and not prohibited by any law for the licensee to employ more persons than it needed, without any agreement with or, in fact, against the desires of its employees or its representatives. The employment of more persons than are needed by the licensee is not condemned in this legislation; such act is not defined to be an evil which must be remedied; such conduct is not denounced or proclaimed to be illegal in any sense through all the wording of the statute. The only time it becomes a crime under this statute is when the employer refuses to agree. If an employee persists in trying to demonstrate his demand to other employees

by means of a picket it becomes a crime. But if the employer agrees to hire fifty more employees than are needed, it is not a criminal offense because of the decision of the employer.

The information charges that one of the means employed by defendant to enforce his request that more persons be employed by the licensee was the "placing and causing to be placed a person as a picket in front of the place of business of said licensee." Can the hiring of additional employees which can be done legally by agreement of the licensee and the union, or by the licensee alone, be constitutionally denounced as illegal when done by the right of free speech as manifested by peaceful picketing?

There is in this case no charge of violence in picketing and therefore the placing of a picket must be regarded by this court as peaceful picketing. The Supreme Court of the United States in *Carlson* v. *California* (1940), 310 U. S. 106 said:

> * * * publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state.

It is this fundamental right that is here challenged as an unlawful means to procure the accomplishment of an admittedly legal objective.

The court is of the opinion, therefore, that picketing where not accompanied by any force or violence, used merely for the purpose of disseminating the views of defendant and the members of the musicians' union is a manifestation of the exercise of the right of free speech and cannot be defined as illegal except under circumstances which warrant a restraint upon freedom of speech or where it is used for some unlawful purpose. It has been repeatedly and universally held that peaceful picketing is a form of speech and discussion that cannot under the First or Fourteenth Amendments be curtailed by any legislative enactment. *Thornhill* v. *Alabama*, 1940, 310 U. S. 88.

The information further charges attempts to coerce, compel and constrain employment by means of (1) causing three musicians to discontinue their employment; and (2) causing three musicians not to accept employment by such licensee.

There is no doubt as to the constitutional right to discontinue an employment or to refuse such employment. The Thirteenth Amendment accomplishes the purpose

> "to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude." *Bailey* v. *Alabama* (1911), 219 U. S. 219.

As was said in *Carpenters' Union* v. *Citizens Committee* (1928), 333 Ill. 225:

> Every man has a full freedom in the disposal of his labor according to his will, and workmen have a right to organize for the purpose of promoting their common welfare by lawful means. They may impose any condition of their employment which they may regard as beneficial to them, and, if not bound by contract, may abandon their employment at any time, either singly or in a body, with or without cause. They have the right to a free and open market in which to dispose of their labor.

Under the Thirteenth Amendment the right of any worker to leave his employment at will or for no reason at all is protected and that right is inviolate. The freedom to quit and refuse to undertake work may as readily be exercised through a group organization as individually.

It is further contended the statute violates the Fifth Amendment because it denies equal protection of the laws. It is fully recognized that there is no specific constitutional right to equal protection of the laws which restricts Congress; but it is true that

> discriminatory legislation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment. *Detroit Bank* v. *United States*, (1943) 317 U. S. 329.

The Circuit Court of Appeals for this Circuit recently said:

> Congress may not arbitrarily classify an act as something, the attributes of which it does not partake, *Heiner* v. *Donnan*, 285 U. S. 312, but it may always designate an act as coming within a certain category if in its inherent nature it may reasonably be said to be endowed with the qualities of such category. *In re Chicago, R. I. & P. Ry. Co.*, (1937) 90 F. (2d) 312, cert. den. *Bankers Trust Co.* v. *Wise*, (1937) 302 U. S. 717.

The Fifth Amendment imposes a restriction upon Congress, not specific, but equally effective as to arbitrary classification. The guarantee of peaceful picketing is found in the specific guarantee of freedom of speech by the First Amendment; the guarantee of freedom to withdraw from employment or refuse to accept employment is found in the specific guarantee of the Fifth and Thirteenth Amendments.

This statute could be used to deprive the members of the musicians union of the right to quit work collectively as a means of enforcing their demands with reference to the making of a new contract. All other employees of this country have the right to quit work collectively in order to use their bargaining power; they have the right to strike in order to enforce their demands.

Broadcasting station employees are placed in a class separate and apart from those of all other employees in the United States. The statute does not apply to employees who are engaged in communication such as telephone or telegraph companies, but is definitely limited in its application to broadcasting station employees and no others. As a result the broadcasting station employees are singled out and held to a more rigid rule than any other employees; they have not the same rights and privileges as other employees; they are penalized and prohibited in their contractual negotiations, while other employees enjoy the right which is denied them. A penalty which applies uniquely to broadcasting station employees and no others; a prohibition which relates solely to contracts between these same employees and no others; an inhibition which defines lawful acts as unlawful when applied to these employees and no others cannot survive the constitutional test. This segregation and classification plainly falls within the arbitrary group of class legislation.

The Court finds it necessary to hold that the statute here involved in the application here sought to be made violates the Fifth Amendment because of indefiniteness and uncertainty in the definition of a criminal offense; violates the First Amendment by its restriction upon freedom of speech by peaceful picketing; violates the Fifth and Thirteenth Amendments by its restriction

upon employment of labor; and violates the Fifth Amendment by an arbitrary classification as between employers and employees and as to other communication industries.

Whether or not the objectives sought to be attained by this statute are or are not economic evils which should be restrained or suppressed are questions not within the province of this court. This court does not hold that Congress is powerless to act or that the declared objectives of this law are beyond the reach of federal legislative control. The only question before the court is the constitutional aspect of this statute as it was written by Congress. On this question the court is of the opinion that this statute is unconstitutional for the reasons above stated.

An order may be entered dismissing the information and discharging the defendant.

Walter J. LaBuy,
WALTER J. LABUY,
Judge United States District Court.

U. S. GOVERNMENT PRINTING OFFICE, 1943

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APR 23 1947

No. 954

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES C. PETRILLO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	5
Summary of argument	7
Argument:	
I. Section 506 of the Federal Communications Act was an exercise of congressional power to prevent monopolies in, and restraints of, interstate commerce	16
A. The monopoly power of the American Federation of Musicians	16
B. The detrimental effect of the Federation's monopoly power on interstate broadcasting	23
II. Congress' power to punish monopolies and restraints of trade in interstate commerce may validly be brought to bear against labor unions	34
III. Appellee has no constitutional right to direct and cause other persons to discontinue or not to accept employment	40
A. Neither the Thirteenth nor the Fifth Amendment protects a right to order other persons not to work	40
B. The Act is not an unconstitutional interference with any right to strike	47
1. Basic principles	47
2. "Unlawful objective" is not a constitutional test	54
3. The Lea Act satisfies the "unlawful objective" test	58
IV. Appellee's rights under the First Amendment are not infringed	69
A. Coercive picketing is not protected by the First Amendment	70
1. The Sherman Act analogy	70
2. The National Labor Relations Act analogy	74
3. Restraints by labor monopolies cannot be effectively regulated if coercive but peaceful picketing is immune from legislative control	77

Argument—Continued

IV. Appellee's rights—Continued
A. Coercive picketing—Continued Page
4. This Court's recent decisions on picketing do not invalidate statutes which prohibit only coercion, and reach picketing only to the extent that it is coercive 80
B. Picketing for an unlawful purpose is not protected by the First Amendment 83
The clear and present danger test 90
V. Section 506 does not violate the Fifth Amendment by denying the equal protection of the laws 92
A. Discrimination in favor of employers 94
B. Discrimination in favor of other industries 97
C. The Act is not discriminatory either because it only reaches musicians or because it applies to other types of radio employees as well 100
VI. Section 506 (a) (1) is not invalid for indefiniteness 102
A. The meaning of Section 506 (a) (1) 104
B. In holding that the Act was indefinite because it allowed the employer to determine the number of employees needed, the court below misconstrued the statute 114
C. Section 506 (a) (1) is sufficiently definite 117
D. Scienter or willfulness 121
E. The necessity for a general standard 125
F. The possible existence of borderline cases does not make a law unconstitutionally indefinite 127
G. Since this case clearly falls within the statutory prohibition appellee has no standing to contend that the Act is too indefinite 131
VII. The issues in this case relate to the validity of the Lea Act with respect to the facts alleged in the information 133
A. Congress intended the Act to stand insofar as was possible, and the Act is severable 135
B. The separability clause 138
1. The Federal Communications Act contains a separability clause 139
2. Any presumption of inseparability would be rebutted by actual legislative intention 142
3. There is no basis for a presumption of inseparability 144
C. *Thornhill v. Alabama* is not applicable 147

Argument—Continued. Page

VIII. The information must stand if any one of the three means of coercion charged states a valid offense 150

Conclusion 152

Appendix A: The Lea Act 153

Appendix B: House Report No. 1508, 79th Cong., 2d Sess. 157

CITATIONS

Cases:

Abby Dodge, The, 223 U. S. 166 ..... 114, 136, 144

Abrams v. *United States*, 250 U. S. 616 91

A. F. of L. v. *Swing*, 312 U. S. 321 ..... 69, 80

Alabama State Federation of Labor v. *McAdory*, 325 U. S. 450 ..... 68, 96, 133

Alabama State Federation of Labor v. *McAdory*, 246 Ala. 1, 18 So. 2d 810 68

Allen-Bradley Co. v. *Local Union No. 3*, 325 U. S. 797, 145 F. 2d 215 ..... 8, 11, 36, 37, 38, 39, 50, 57, 59, 71, 84, 133

Apex Hosiery Co. v. *Leader*, 310 U. S. 469 35

Armour & Co. v. *Wantock*, 323 U. S. 126 120

Associated Press v. *National Labor Relations Board*, 301 U. S. 103 135

Bailey v. *Alabama*, 219 U. S. 219 43

Bakery Drivers Local v. *Wohl*, 315 U. S. 769 ..... 69, 80, 81, 82

Balanced Rock Scenic Attractions v. *Town of Manitou*, 38 F. 2d 28, certiorari denied, 281 U. S. 764 141

Bandini Co. v. *Superior Court*, 284 U. S. 8 ..... 119, 126

Bank of Hamilton v. *Dudley*, 2 Pet. 492 146

Bartels v. *Birmingham*, No. 731, this term 20

Baxter v. *McGee*, 82 F. 2d 695, certiorari denied, 298 U. S. 680 141

Benito Rovira Co., Inc. v. *Yampolsky, et al.*, 187 N. Y. Supp. 894 ..... 46, 60

Berea College v. *Kentucky*, 211 U. S. 45 144

Binderup v. *Pathe Exchange*, 263 U. S. 291 71

Blair v. *Chicago*, 261 U. S. 400 141

Bourjois, Inc. v. *Chapman*, 301 U. S. 183 132

Bowman v. *Continental Oil Co.*, 256 U. S. 642 144

Bridges v. *California*, 314 U. S. 252 91

Bridges v. *Wixon*, 326 U. S. 135 91

Butler v. *Perry*, 240 U. S. 328 43

Cafeteria Employees Union v. *Angelos*, 320 U. S. 293 ..... 69, 80

Campbell v. *Mississippi Union Bank*, 7 Miss. 625 146

Cantwell v. *Connecticut*, 310 U. S. 296 91

Carey v. *South Dakota*, 250 U. S. 118 144

Carlson v. *California*, 310 U. S. 106 ..... 69, 80

Carpenters Union v. *Ritter's Cafe*, 315 U. S. 722 ..... 82, 83, 85

Carroll v. *Greenwich Insurance Co.*, 199 U. S. 401 98

Carter v. *Coal Co.*, 298 U. S. 238 142

Central Lumber Co. v. *South Dakota*, 226 U. S. 157 95

Cases—Continued

	Page
Champlin Refining Co. v. *Corporation Commission*, 286 U. S. 210	103, 136, 143
Chaplinsky v. *New Hampshire*, 315 U. S. 568	91
Chapman, In re, 166 U. S. 661	136, 143
City of New York v. *Miln*, 11 Pet. 102	146
Civil Rights Cases, 109 U. S. 3	43
Collins v. *Kentucky*, 234 U. S. 634	122
Commonwealth v. *Hitchings*, 5 Gray 482	146
Commonwealth v. *Kimball*, 24 Pick. 359	146
Connally v. *General Construction Co.*, 269 U. S. 385	103
Consolidated Aircraft Corp. v. *National Labor Relations Board*, 141 F. 2d 785	74
Corrigan v. *Buckley*, 271 U. S. 323	43
Crowell v. *Benson*, 285 U. S. 22	114, 135
Cumberland Telephone & Tel. Co. v. *City of Memphis*, 200 Fed. 657	141
Detroit Bank v. *United States*, 317 U. S. 329	93
Diamond Glue Co. v. *United States Glue Co.*, 187 U. S. 611	144
Donnelley, R. R. & Sons Co. v. *National Labor Relations Board*, 156 F. 2d 416, certiorari denied, Jan. 20, 1947	74
Dorchy v. *Kansas*, 264 U. S. 286	136
Dorchy v. *Kansas*, 272 U. S. 306	47, 48, 49, 57, 59, 85
Duplex Printing Press Co. v. *Deering*, 254 U. S. 443	49, 85
Eastern Retail Lumber Dealers' Association v. *United States*, 234 U. S. 600	68, 71
Eilenbecker v. *Plymouth County*, 134 U. S. 31	136, 144
Electric Bond & Share Co. v. *Securities and Exchange Commission*, 303 U. S. 419	142, 143
Electrical Transcription Manufacturers and American Federation of Musicians, 16 War Labor Rep. 369	20
El Paso & N. E. Ry. v. *Gutierrez*, 215 U. S. 87	143
Empire Theater Co. v. *Cloke*, 53 Mont. 183, 163 P. 107	46, 60
Euclid v. *Ambler Realty Co.*, 272 U. S. 365	57
Exchange Bank of Columbus v. *Hines*, 3 Ohio St. 1	146
Federal Communications Commission v. *Sanders Radio Station*, 309 U. S. 470	32
Federal Trade Commission v. *Raymond Bros.-Clark Co.*, 263 U. S. 565	68
Field v. *Clark*, 143 U. S. 649	143, 146
Fisher v. *McGirr*, 1 Gray 1	146
Ford v. *United States*, 273 U. S. 593	151
Fox v. *Washington*, 236 U. S. 273	119, 132
Francisco v. *Commonwealth*, 180 Va. 371, 23 S. E. 2d 234	120
Gitlow v. *New York*, 268 U. S. 652	91
Glatfelter Co. v. *National Labor Relations Board*, 141 F. 2d 631	74
Glenn v. *Humphreys*, 10 Fed. Cas. No. 5,480	146
Gompers v. *Bucks Stove & Range Co.*, 221 U. S. 418	71, 72, 78, 86

Cases—Continued

	Page
Gorin v. *United States*, 312 U. S. 19	119, 122
Grand Trunk Ry. v. *Michigan R. R. Comm.*, 231 U. S. 457	144
Grenada Lumber Co. v. *Mississippi*, 217 U. S. 433	68, 143
Harper v. *Brennan*, 311 Mich. 489, 18 N. W. 2d 905	86
Hartzel v. *United States*, 322 U. S. 680	91, 117
Hatch v. *Reardon*, 204 U. S. 152	144
Haverhill Strand Theater v. *Gillen*, 229 Mass. 413, 118 N. E. 671	46, 60
Herndon v. *Lowry*, 301 U. S. 242	91, 122
Hirabayashi v. *United States*, 320 U. S. 81	93, 95
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229	59
Hodges v. *United States*, 203 U. S. 1	43
Huntington v. *Worthen*, 120 U. S. 97	144
Hygrade Provision Co. v. *Sherman*, 266 U. S. 497	122
International Bridge Co. v. *New York*, 254 U. S. 126	144
International Brotherhood, Etc. v. *Western U. Tel. Co.*, 46 F. 2d 736, certiorari denied, 284 U. S. 630	43
International Brotherhood of Elec. W. v. *Western U. Tel. Co.*, 6 F. 2d 444	43
International Harvester Co. v. *Kentucky*, 234 U. S. 216	103, 122, 130
Jachne v. *New York*, 128 U. S. 189	136, 144
Jones v. *Opelika*, 316 U. S. 584	149, 150
Joslin Mfg. Co. v. *Providence*, 262 U. S. 668	144
Kansas City Southern Ry. Co. v. *Anderson*, 233 U. S. 325	132
Kay v. *United States*, 303 U. S. 1	119
Kelleher v. *French*, 22 F. 2d 341	141
Keokee Coke Co. v. *Taylor*, 234 U. S. 224	95
Kimmish v. *Ball*, 129 U. S. 217	143
Kuehner v. *Irving Trust Co.*, 299 U. S. 445	132
Lafayette Dramatic Productions v. *Ferentz*, 305 Mich. 193, 9 N. W. 2d 57	46, 60, 86, 87
Lapina v. *Williams*, 232 U. S. 78	63
Lloyd v. *Dollison*, 194 U. S. 445	103
Loeb v. *Columbia Township Trustees*, 179 U. S. 472	144, 146
Loewe v. *Lawlor*, 208 U. S. 274	71
Louisville & Nash. R. R. Co. v. *Garrett*, 231 U. S. 298	144
Louisville, N. O. & Texas Ry. Co. v. *Mississippi*, 133 U. S. 587	136, 144
McClure v. *United States*, 95 F. 2d 744, affirmed, 305 U. S. 472	141
McCullough v. *Virginia*, 172 U. S. 102	144
McPherson v. *Blacker*, 146 U. S. 1	144
Marcus Brown Co. v. *Feldman*, 256 U. S. 170	43
Markham & Callow v. *International Woodworkers*, 170 Ore. 617, 135 P. 2d 727	87
Marsh v. *Alabama*, 326 U. S. 501	91
May Department Stores Co. v. *National Labor Relations Board*, 326 U. S. 376	75

Cases—Continued

	Page
Mayor of Savannah v. *State*, 4 Ga. 26	146
Metropolitan Casualty Insurance Co. v. *Brownell*, 294 U. S. 580	98
Milk Wagon Drivers Union v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287	80, 81, 148, 149
Miller v. *Oregon*, 273 U. S. 697	179, 126
Miller v. *Strahl*, 239 U. S. 426	126, 132
Missouri Rate Cases, 230 U. S. 474	144
Mulkern v. *State*, 176 Wis. 490, 187 N. W. 190	126
Mundy v. *Monroe*, 1 Mich. 68	146
Nash v. *United States*, 229 U. S. 373	118, 121, 130
National Broadcasting Co. v. *United States*, 319 U. S. 190	7, 24, 34, 100
National Labor Relations Board v. *Aluminum Goods Manufacturing Co.*, 125 F. 2d 353	74
National Labor Relations Board v. *American Laundry Machine Co.*, 152 F. 2d 409	74
National Labor Relations Board v. *American Pearl Button Co.*, 149 F. 2d 311	74
National Labor Relations Board v. *Franke Bros. Co.*, 137 F. 2d 989, affirmed: 321 U. S. 702	74
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1	44, 96, 114, 135
National Labor Relations Board v. *Peterson*, 157 F. 2d 514, certiorari denied, March 17, 1947	74
National Labor Relations Board v. *Virginia Electric & Power Co.*, 314 U. S. 469	75
Nelson, In re, 11 F. Supp. 733	141
New York Central R. R. v. *United States*, 212 U. S. 481	143
Norman v. *Baltimore & Ohio R. Co.*, 294 U. S. 240	57
Norris v. *City of Boston*, 4 Mete. 282	146
North American Co. v. *Securities and Exchange Commission*, 327 U. S. 686	57
Old Dearborn Distributing Co. v. *Seagram Corp.*, 299 U. S. 183	119
Omaechevarria v. *Idaho*, 246 U. S. 343	119, 122, 124
Opera on Tour v. *Weber*, 285 N. Y. 348, 34 N. E. 2d 349, certiorari denied, 314 U. S. 615	46, 60
Pennekamp v. *Florida*, 328 U. S. 331	91
Penniman's Case, 103 U. S. 714	144
Pennsylvania Co. v. *United States*, 236 U. S. 351	140
People v. *Hill*, 7 Cal. 97	146
Peters v. *Central Labor Council*, 169 P. 2d 870	87, 88
Pierce v. *United States*, 252 U. S. 239	91
Plessy v. *Ferguson*, 163 U. S. 537	43
Poindexter v. *Greenhow*, 114 U. S. 270	132
Pollock v. *Williams*, 322 U. S. 4	43
Powhatan Steamboat Co. v. *Appomattox R. R. Co.*, 24 How. 247	120

Cases—Continued

	Page
Premier-Pabst Sales Co. v. *Grosscup*, 298 U. S. 226	132
Presser v. *Illinois*, 116 U. S. 252	144
Radio Station WOV, 22 War Labor Ref. 744	27
Rahrer, In re, 140 U. S. 545	136, 144
Railroad Companies v. *Schutte*, 103 U. S. 118	144
Railroad Retirement Board v. *Alton Railroad Co.*, 295 U. S. 330	143
Ratterman v. *Western Union Tel. Co.*, 127 U. S. 411	144
Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S. 362	143, 146
Rearick v. *Pennsylvania*, 203 U. S. 507	136
Retail Clerks' Union v. *Wisconsin Employment Relations Board*, 242 Wis. 21, 6 N. W. 2d 698	87
R. H. White Co. v. *Murphy*, 310 Mass. 510, 38 N. E. 2d 685	87
Robertson v. *Baldwin*, 165 U. S. 275	43
Robinson v. *United States*, 324 U. S. 282	127, 131, 138
Ruppert v. *Caffey*, 251 U. S. 264	57
Santo v. *Iowa*, 2 Iowa 165	146
Schaefer v. *United States*, 251 U. S. 466	91
Schenck v. *United States*, 249 U. S. 47	12, 90
Scott-Stafford Opera House Co. v. *Minn. Ass'n*, 118 Minn. 410, 136 N. W. 1092	46, 60
Screws v. *United States*, 325 U. S. 91	110, 111, 114, 119, 122, 123, 124
Shevlin-Carpenter Co. v. *Minnesota*, 218 U. S. 57	143
Singer Sewing Machine Co. v. *Brickell*, 233 U. S. 304	144
Slaughter-House Cases, 16 Wall. 36	43
Small Co. v. *American Sugar Ref. Co.*, 267 U. S. 233	122
Smiley v. *Kansas*, 196 U. S. 447	136, 144
Sondericker v. *United States*, 41 F. 2d 144	151
Southern Pac. Co. v. *Campbell*, 230 U. S. 537	144
Southwestern Oil Co. v. *Texas*, 217 U. S. 114	143
Stapleton v. *Mitchell*, 60 F. Supp. 51	68
State v. *Snow*, 3 R. I. 64	146
State Freight Tax Case, The, 15 Wall. 232	144, 146
Stearns Lumber Co., A. T. v. *Howlett*, 260 Mass. 45	61
Steffler v. *Johnston*, 121 F. 2d 447, certiorari denied, 314 U. S. 676	141
Steward Machine Co. v. *Davis*, 301 U. S. 548	93, 138, 143
St. Louis, Iron Mountain & Southern Ry. Co. v. *Wynne*, 224 U. S. 354	132
St. Louis, S. W. Ry. v. *Arkansas*, 235 U. S. 350	114, 144
Scarges v. *Crowninshield*, 4 Wheat. 122	146
Sunshine Coal Co. v. *Adkins*, 310 U. S. 381	93
Supervisors v. *Stanley*, 105 U. S. 305	146
Taylor v. *Georgia*, 315 U. S. 25	43
Telegraph Co. v. *Texas*, 105 U. S. 460	144
Texas & New Orleans R. Co. v. *Brotherhood of Railway Clerks*, 281 U. S. 548	55, 56

Cases—Continued

	Page
Texas v. *Eastern Texas R. R. Co.*, 258 U. S. 204	141
Thomas v. *Collins*, 323 U. S. 516	72, 75, 91
Thornhill v. *Alabama*, 310 U. S. 88	11, 69, 80, 81, 85, 91, 147
Tiernan v. *Rinker*, 102 U. S. 123	144
Tullis v. *Lake Erie & W. R. R.*, 175 U. S. 348	144
United Brotherhood of Carpenters, et al. v. *United States*, Nos. 6–10, decided March 10, 1947	39
United Public Workers v. *Mitchell*, No. 20, decided February 10, 1947	55, 133, 135
United States v. *Alford*, 274 U. S. 264	119
United States v. *American Federation of Musicians*, 318 U. S. 741	34, 39
United States v. *Brewer*, 139 U. S. 278	102
United States v. *Coe*, 155 U. S. 76	143
United States v. *Cohen Grocery Co.*, 255 U. S. 81	122, 123
United States v. *Darby*, 312 U. S. 100	44
United States v. *Delaware & Hudson Co.*, 213 U. S. 366	111, 143
United States v. *Gaskin*, 320 U. S. 527	43
United States v. *General Motors Corp.*, 121 F. 2d 394, certiorari denied, 314 U. S. 618	71
United States v. *Hutcheson*, 312 U. S. 219	35
United States v. *Illinois Central R. Co.*, 303 U. S. 239	111
United States v. *LaFranca*, 282 U. S. 568	140
United States v. *Lovett*, 328 U. S. 303	100
United States v. *Murdock*, 290 U. S. 389	111
United States v. *Ragen*, 314 U. S. 513	118, 122, 123, 124, 129
United States v. *Reynolds*, 235 U. S. 133	43
United States v. *St. Paul M. & M. Ry. Co.*, 247 U. S. 310	63
United States v. *United Mine Workers*, Nos. 759–760, decided March 6, 1947	8, 41, 42, 43, 78
United States v. *Wong Kim Ark*, 169 U. S. 649	140
United States v. *Woolsey*, 28 Fed. Cas. No. 16763	141
United States v. *Wurzbach*, 280 U. S. 396	127, 132
Unity v. *Burrage*, 103 U. S. 447	144
Utah Power & Light Co. v. *Pfost*, 286 U. S. 165	143
Virginia Electric & Power Co. v. *National Labor Relations Board*, 319 U. S. 533	75
Virginian Ry. Co. v. *System Federation*, 300 U. S. 515	44, 55, 57
Warren v. *Mayor of Charlestown*, 2 Gray 84	136
Waters-Pierce Oil Co. v. *Deselms*, 212 U. S. 159	143
Waters-Pierce Oil Co. v. *Texas (No. 1)*, 212 U. S. 86	103
Weeds, Inc. v. *United States*, 255 U. S. 109	122
Welinsky v. *Hillman, et al.*, 185 N. Y. Supp. 257	46, 60
Wellington, Petitioner, 16 Pick. 87	146
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379	9, 44, 45, 57
Western Union Tel. Co. v. *Richmond*, 224 U. S. 160	143, 144
Whitney v. *California*, 274 U. S. 357	91
Willcox v. *Consolidated Gas Co.*, 212 U. S. 19	143

Cases—Continued. Page

Williams v. *Standard Oil Co.*, 278 U. S. 235 ..... 136, 142, 143, 144, 147

Wisconsin Employment Relations Board v. *Milk Drivers Union*, 238 Wis. 379, 9. N. W. 2d 57, certiorari denied, 316 U. S. 668 86

Wright v. *Vinton Branch Bank*, 300 U. S. 440 114

Yazoo & Mississippi Ry. Co. v. *Jackson Vinegar Co.*, 226 U. S. 217 132

Constitution and Statutes:

Constitution of the United States:

First Amendment 70, 75, 77, 80, 149

Fifth Amendment 9, 41, 44

Thirteenth Amendment 9, 40, 41, 43

Clayton Act, 38 Stat. 731, Sec. 6, 15 U. S. C. Sec. 17 55

Federal Communication Act, 48 Stat. 1105, 47 U. S. C. 51:

Sec. 308 32

Sec. 506 16

Sec. 608 ..... 15, 139

Lea Act of April 16, 1946, Pub. No. 344, 79th Cong., 2d Sess., 47 U. S. C. 506:

Sec. 506:

(a) 2, 3, 13, 14, 62, 104, 109, 110, 117, 118, 128, 129, 153

(b) 154

(c) 4, 54, 62, 155

(d) 4, 110, 155

(e) 4, 156

National Labor Relations Act, 49 Stat. 449 ..... 11, 58, 74, 76, 92

Sherman Anti-Trust Act, 26 Stat. 209 ..... 8, 11, 16, 35, 36, 38, 39, 50, 71, 92, 121

Miscellaneous:

29 A. L. R. 1298 120

American Law Institute, *Restatement of the Law of Torts*, Volume IV, pp. 94–95, Sec. 775 59

91 Cong. Rec. 698 4

92 Cong. Rec.:

1543–1544, 1545, 1548, 1550, 1557, 3242 105

1544, 1547, 1549, 1555, 1556, 1557, 1558, 3253 23

1546 115

1549 ..... 20, 107

1549–1550, 3250 105

1549, 1550, 1556, 2822, 3242 108

1549–3245 105

1550 63

1550, 1559, 3241, 3248 107

1554, 3250 67

1558 24

1559 64

Miscellaneous—Continued

92 Cong. Rec.—Continued Page
1562 112
1564 115
1566 4
1710, 2174 4
2823 4
3244–3245 64
3245 65, 115, 128
3246 129
3248 66, 108
3249 113
3250 112
3251 108
3253 17
3256 115, 128
3257 108, 113
3258 4
Cooley, *Constitutional Limitations* (1868), pp. 180–181 140
15 C. J. S. 1008 60
Dodd, *Picketing and Free Speech:* A Dissent, 56 Harv. L. Rev. 513 (1943) 88, 91
E[illegible] *Statutes*, Sec. 294 141
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H. R. [illegible] Cong., 2d sess. 4
H. Re[illegible] 79th Cong., 2d Sess. 20, [illegible] 21, 23, 25, 32, 34, 56, 62, 105, 107, 108, 137, 157
H. Rep. 1824, 79th Cong., 2d sess. 4
Hearings before House Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess., on S. 63 and H. R. 1648, *Interference with Broadcasting of Non-Commercial Educational Programs* (1945 Hearings) 18, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 33, 35, 105, 106
Hearings before Subcommittee of Senate Committee on Interstate Commerce, 77th Cong., 2d Sess., pursuant to S. Res. 286, *Use of Mechanical Reproduction of Music*, (1942 Hearings) 18, 19
Hearings before Subcommittee of Senate Committee on Interstate Commerce, 78th Cong., 1st Sess., *Use of Mechanical Reproduction of Music* (unprinted). (1943 Hearings) 17, 19
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Larson, *May Peaceful Picketing Be Enjoined?*, 22, Tex. L. Rev. 392 (1944) 88
Note, *Indefinite Criteria of Definiteness in Statutes*, 45 Harv. Law Rev. 160 103

Miscellaneous—Continued

	Page
Oakes, *Organized Labor and Industrial Conflicts* (1927), pp. 376, 424, 433	59
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Sec. 103	60
Secs. 113–114	84
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Wharton, *Criminal Law* (12 Ed. 1932):	
Sec. 126, et seq	120
Sec. 322	121
Sec. 1700	120
S. 63, 79th Cong., 1st sess	4
S. Rep. No. 9, 79th Cong., 1st sess	4

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 954

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES C. PETRILLO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 3), is reported in 68 F. Supp. 845.

JURISDICTION

The judgment of the court below was entered on December 2, 1946 (R. 9). The notice of appeal was filed on December 26, 1946 (R. 9). The jurisdiction of this Court is invoked under the Criminal Appeals Act, as amended May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. V, § 682.

QUESTIONS PRESENTED

Section 506 (a) (1) of the Federal Communications Act, as amended April 16, 1946, makes it unlawful by any means willfully to coerce a radio licensee "to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services". The appellee was charged, in a criminal information, with willfully coercing a licensee to employ persons not needed to perform actual services, through the following means: by directing employees of the licensee to discontinue their employment, by directing said employees and other persons not to accept employment by said licensee, and by placing a person as a picket in front of the place of business of said licensee.

The questions presented are:[1]

(1) Whether, insofar as the Act prohibits appellee from directing and causing other persons to discontinue or not to accept employment, it violates the Thirteenth or Fifth Amendments to the Constitution;

(2) Whether, insofar as the Act prohibits appellee from placing a picket in front of a licensee's place of business, it violates the First Amendment to the Constitution;

(3) Whether Section 506 contains an arbitrary

[1] Subsidiary matters discussed in Points VII and VIII of this brief relate to the scope of the issues on which this Court need pass.

classification in violation of the Fifth Amendment because it extends only to persons who coerce radio licensees and not to the licensees themselves, because it does not extend to other industries, or because it applies to all broadcasting employees and not merely to musicians;

(4) Whether Section 506 (a) (1) violates the Fifth Amendment because of indefiniteness.

STATUTE INVOLVED

The statute involved, the Lea Act, (Act of April 16, 1946, Pub. No. 344, 79th Cong., 2d Sess., 47 U. S. C. A. 506), entitled, an Act "To amend title V of the Communications Act of 1934 [47 U. S. C. 51, *et seq.*] so as to prohibit certain coercive practices affecting radio broadcasting.", is set forth in full in the Appendix, *infra*, pp. 153–156. The provisions mainly pertinent here provide as follows:

> COERCIVE PRACTICES AFFECTING BROADCASTING
>
> SEC. 506. (a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use of express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—
>
> (1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services;

(c) The provisions of subsection (a) * * * of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed.

(d) Whoever willfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both.

(e) As used in this section the term "licensee" includes the owner or owners, and the person or persons having control or management, of the radio station in respect of which a station license was granted.

House Committee Report No. 1508, 79th Cong., 2d Sess., is also attached as an Appendix (pp. 157–172).[2]

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[2] The bill which originally passed the Senate prohibited only interference with non-commercial educational broadcasts. S. 63, 79th Cong., 1st Sess.; S. Rep. No. 9, 79th Cong., 1st Sess.; 91 Cong. Rec. 698. After hearings the House Committee reported a revised bill (H. R. 5117, 79th Cong., 2d Sess.) substantially in the form finally enacted; this bill was passed (92 Cong. Rec. 1566) and then sent to conference (*id.*, 1710, 2174). Only two minor changes were made by the Conference Committee (H. Rep. 1824, 79th Cong., 2d Sess.). The House Committee Report is therefore the only committee report which discusses the provisions of the present Act. The Act was passed by a vote of 186–16 in the House (92 Cong. Rec. 2823), and 47–3 in the Senate (*id.*, at 3255).

STATEMENT

On June 13, 1946 a criminal information was filed against the appellee charging a violation of Section 506 of the Federal Communications Act, as amended. The information reads as follows (R. 1-2):

> That at all times mentioned herein the Drovers Journal Publishing Company, Inc. (hereinafter referred to as the Licensee) was an Illinois corporation and the owner and operator of a licensed radio broadcasting station known as Radio Station WAAF, located in Chicago, Illinois.
>
> That for several years last past up to, on or about, May 28, 1946, in connection with the operation of its radio broadcasting facilities, the licensee employed certain persons who were sufficient and adequate in number to perform all the actual services needed by said licensee in connection with the conduct of its broadcasting business.
>
> That notwithstanding the premises aforesaid, one James C. Petrillo, President of the Chicago Federation of Musicians, on or about May 28, 1946, at Chicago, Illinois, wilfully, by the use of force, intimidation, duress and by the use of other means, did attempt to coerce, compel and constrain said licensee to employ and agree to employ, in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services, in the following manner, o wit:

(1) By directing and causing three musicians, members of the Chicago Federation of Musicians, theretofore employed by the said licensee in connection with the conduct of its broadcasting business, to discontinue their employment with said licensee;

(2) By directing and causing said three employees and other persons, members of the Chicago Federation of Musicians, not to accept employment by said licensee; and,

(3) By placing and causing to be placed a person as a picket in front of the place of business of said licensee.

Appellee moved to dismiss the information on the ground that the statute on which it is based contravenes the First, Fifth, Tenth and Thirteenth Amendments to the United States Constitution (R. 2-3). On December 2, 1946 the District Court sustained the motion to dismiss (R. 9). The District Court held (R. 8):

> * * * that the statute here involved in the application here sought to be made violates the Fifth Amendment because of indefiniteness and uncertainty in the definition of a criminal offense; violates the First Amendment by its restriction upon freedom of speech by peaceful picketing; violates the Fifth and Thirteenth Amendments by its restriction upon employment of labor; and violates the Fifth Amendment by an arbitrary classification as be-

tween employers and employees and as to other communication industries.

The Government has appealed directly to this Court under the Criminal Appeals Act, inasmuch as the decision below was based on the unconstitutionality of a statute (R. 9–10). On March 3, 1947, this Court noted probable jurisdiction (R. 13).

SUMMARY OF ARGUMENT

I

The evil to which the Lea Act was addressed is a special manifestation of the general problem of monopolies and restraint of trade—the exercise of monopoly power by a labor organization in a manner which interfered with the effective use of the facilities for radio broadcasting. The Lea Act is designed partially to remove obstacles to the enforcement of the antitrust laws which Congress itself had created in other legislation. The types of exorbitant demands at which the statute was directed impair the financial resources of radio licensees and thereby harmfully affect the radio service available to the public, contrary to the purposes of the Federal Communications Act. Cf. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216, 217. The Lea Act amends the Communications Act in order to further the attainment of its legitimate objectives under the Commerce Clause.

II

Congress has authority under the Commerce Clause to prohibit restraining or monopolistic practices affecting radio broadcasting, and this power extends to restraints by labor unions. This is established by the cases under the Sherman Act, all of which have assumed the constitutional power of Congress over this subject. Most recently in *Allen-Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797, this Court sustained the application of the Sherman Act to coercive acts of a labor organization, including striking and peaceful picketing. The factor of employer cooperation there present, though important under the Sherman Act, was clearly regarded as not of constitutional significance. That case would seem to be controlling as to the issues presented here as to the power of Congress to prohibit strikes and picketing which restrain interstate commerce.

III

A. Inasmuch as the information charges only that appellee has sought to coerce Station WAAF by directing and causing other persons to refrain from working, appellee is in no position to urge that he is being required to work in possible contravention of the Thirteenth and Fifth Amendments. Neither of these Amendments gives constitutional sanctity to any right to order other persons not to work. Cf. *United States*

v. *United Mine Workers*, decided March 6, 1947. The Thirteenth Amendment was never meant to extend to such a situation, and the Fifth Amendment does not give greater protection to the right to interfere with the working relations of others than to the right to enter into working relations on any terms one chooses. Cf. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379. Both are subject to legislative controls which are reasonably related to a legitimate Congressional objective.

B. In any event, if the case be regarded as involving a question of the right to strike, the Act would be constitutional. The right to strike, as conceded by appellee, is not absolute. That means that the legislature may limit it, so long as it not act arbitrarily or in a manner not reasonably related to a proper objective. It was not inappropriate for Congress to conclude that feather-bedding demands are incompatible with the public interest in radio broadcasting.

Appellee admits that Congress may forbid strikes for unlawful objectives, but contends that the Lea Act does not make the purpose of a strike unlawful since it is not made illegal for the licensee voluntarily to do what he cannot be coerced to do. We submit that the "unlawful objective" test formulated by the courts in labor cases at common law is not a constitutional criterion. Here there was ample basis for Congress to believe that its legitimate goal of pre-

venting coerced compliance with wasteful demands upon interstate broadcasting could not be achieved unless the Act extended to coercion through strikes, which are the normal means used by a monopolistic union to attain its objectives. This satisfies constitutional requirements.

In any event the Lea Act satisfies the "unlawful objective" test. Coercion, including striking and picketing, is not made unlawful apart from the objectives enumerated in the Act. A strike directed at inducing a licensee to accede to a demand that he hire persons he does not need is thus a strike for an unlawful purpose, and nonetheless so because it would be lawful for the licensee to hire more workers if he wished—just as the object of an extortioner is unlawful even though the victim could voluntarily agree to make the identical payment. Furthermore the precedents in this Court and at common law from which the "unlawful objective" test is derived refute appellee's argument, since in most of the cases in which the objectives of strikers have been held unlawful the employer could lawfully have granted the striker's demands.

IV

A. The Lea Act does not prohibit picketing as such but coercion. Picketing violates the Act only if and to the extent that it is coercive, and like other forms of coercive speech, to the extent

that it is coercive it is not protected by the First Amendment. It is well established that when words, whether oral or written, are used in order to coerce, the First Amendment does not protect them. This is shown by many cases under the Sherman Act and the National Labor Relations Act. Unless peaceful verbal instructions, whether set forth in pickets' placards or elsewhere, are within the reach of governmental authority, Congress will be helpless to control or regulate the coercive conduct of monopolistic unions even though such regulation is substantively within its constitutional powers.

This Court's recent decisions, beginning with *Thornhill* v. *Alabama*, are entirely consistent with these views. They have invalidated only laws which prohibited picketing generally or without regard to its coercive character; they have not suggested the invalidity of statutes which prohibit picketing only when and to the extent that it is coercive.

B. Furthermore picketing for an unlawful purpose is not protected by the First Amendment. The authorities establish that if a strike is unlawful because of its purpose, picketing for the same purpose is likewise unlawful. The *Allen-Bradley* case, which restrains peaceful picketing, is the most recent pronouncement of this Court on the subject. Clearly, it would be futile for Congress to have the power to proscribe the ends for which

strikes could be prohibited if labor organizations could accomplish the same thing, equally effectively, by picketing. This is so even though picketing may be a form of speech or of writing. An order issued by a labor leader would always be verbal, and it would not acquire greater sanctity because of being carried up and down the sidewalk on a picket's placard. Soliciting others to give aid to an unlawful course of conduct is not constitutionally protected free speech, at least where there is a "clear and present danger" that the solicitation will be successful and thus bring about the "substantive evils that Congress has a right to prevent." *Schenck* v. *United States,* 249 U. S. 47, 52. Here Congress has a right to prevent the evils at which the Lea Act is directed, and the picketing is directly and immediately—that is, clearly and presently—designed to produce those evils.

V

Section 506 does not violate the Fifth Amendment by denying the equal protection of the laws.

A. The Act does not discriminate in favor of employers because they may voluntarily do what they may not be coerced into doing. Congress may hit at abuses which have been shown to exist without going beyond to cover the entire field of possible abuse. There has been no showing that the practice of hiring unnecessary employees

has been prevalent in the broadcasting industry apart from outside coercion. Congress could reasonably assume that the employers' normal self-interest would adequately protect the public in this respect.

B. It was not improper for Congress to legislate merely for the broadcasting industry when it is not shown that other industries are similarly afflicted.

C. The Act is general legislation applying to anyone who coerces radio licensees. It is not invalid because it was enacted as a result of the activities of a particular organization. There is clearly no substance to appellee's argument that the Act contains an unconstitutional classification because it applies to all broadcasting employees and not merely to the musicians, when the evidence before Congress had shown only the musicians "guilty of any excesses."

VI.

The district court's holding that Section 506 (a) (1) is too indefinite is based upon a misconstruction of the statute. That provision makes it unlawful for anyone *"willfully"* to coerce radio licensees "to employ or agree to employ * * * persons in excess of the number of employees needed by such licensee to perform actual services." The language, context and history of this provision shows that it was not intended to

reach *bona fide* disputes as to conditions of employment, including such matters as hours of work and whether additional workers might be required to prevent employees from working too hard, but deliberate demands for payment to additional employees made in complete disregard for the employer's need and without any justification from the viewpoint of actually getting the employer's business done. The requirement that a violation be willful and the repeated Congressional references to the offense created as immoral and akin to extortion make this particularly clear. The district court was therefore wrong in holding that the number of employees needed was to be determined by the licensee. The bill was amended specifically so as to avoid that result.

There can be no question but that in the type of case Congress intended the statute to reach a defendant would know that he was forcing upon an employer more employees than were needed. The provision in Section 506 (a) (1) is at least as definite as others which have been upheld by this Court. And the requirement of willfulness prevents the statute from becoming a "trap for those who act in good faith." The Court has properly attached great significance to this factor, and in no case has it held a law indefinite when *scienter* was an element of the offense. Any question as to the specificity of the statutory

language must be resolved in the Act's favor by reason of this requirement. The fact that there may be borderline cases does not render a statute unconstitutionally indefinite, if there is a hard core of circumstances to which a statute will unquestionably apply, as to which the ordinary person would have no doubt as to its application, and if this comprises the mass of situations with which the act deals. Furthermore, since this case clearly falls within the statutory prohibition, appellee has no standing to contend that the Act is too indefinite.

VII

The issues in this case relate to the validity of the Lea Act with respect to the facts alleged in the information. This Court will not decide hypothetical constitutional controversies. There is no basis for appellee's argument that the Act must be treated as an unseverable whole and must fall if any application might be unconstitutional. The Lea Act can, without difficulty, be applied to those factual situations which validly come within it, and Congress clearly intended it to stand insofar as it possibly could. The separability clause in Section 608 of the Communications Act is applicable to Section 506 and is controlling; but even if it were thought inapplicable, the result would be the same in view of the clear cut Congressional intention.

VIII

The information must stand if any one of the three means of coercion charged states a valid offense.

ARGUMENT

I

SECTION 506 OF THE FEDERAL COMMUNICATIONS ACT WAS AN EXERCISE OF CONGRESSIONAL POWER TO PREVENT MONOPOLIES IN, AND RESTRAINTS OF, INTERSTATE COMMERCE

Essential to a critical analysis of the constitutional validity of any statute is an understanding of the problems which gave rise to its enactment. The evil to which Section 506 (a) (1) of the Federal Communications Act was addressed is merely one special manifestation of the general problem of monopolies and restraints of interstate trade which evoked the Sherman Anti-trust Act. We shall show also, in subsequent sections of this brief, that the power here exercised by Congress rests on much the same constitutional basis as the Sherman Act. In this section of the brief we shall describe the serious restraints of commerce in the field of broadcasting which Congress sought to remedy through enactment of Section 506 (a) (1).

A. *The monopoly power of the American Federation of Musicians*

That the American Federation of Musicians controls all the musicians in the United States

was admitted by its president, the appellee, at a congressional hearing held in 1943.[2] During the course of his testimony he stated (p. 44, quoted in 92 Cong. Rec. 3253, during the debates on the present Act):

> Senator TUNNELL. Mr. Petrillo, what percentage of the musicians of the country belong to your union?
>
> Mr. PETRILLO. Senator, I will say right now, that every professional musician in the United States and Canada belongs to the American Federation of Musicians.
>
> Senator TUNNELL. Every one does?
>
> Mr. PETRILLO. Yes, sir.
>
> Senator MCFARLAND. Now, is not that your unique position that you are talking about?
>
> Mr. PETRILLO. I will say yes.
>
> * * * * *

(p. 61:)

> Senator MCFARLAND. * * * the real unique position that you were in was the fact that you do control the musicians of the country. In that way you have prevented the recording of music; that is right, is it not?
>
> Mr. PETRILLO. That is right.

During the 1945 hearings eventuating in the

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[2] Hearings before Subcommittee of Senate Committee on Interstate Commerce, 78th Cong., 1st Sess., *Use of Mechanical Reproduction of Music* (unprinted) (1943 Hearings), p. 44.

present law' the Chairman of the Federal Communications Commission, was asked whether it was "true that * * * nobody could broadcast for hire except with the consent of this union? What I am getting at is, would that have the effect of recognizing the closed shop in musical broadcasting in this country?" He replied: "That is the situation that exists now."[5] And there was additional uncontradicted testimony that "the American Federation of Musicians rigorously enforces all over the country a 100-percent closed shop."[6]

The power of the American Federation of Musicians first came to the attention of Congress in 1942 when that organization, through its president, appellee, issued an order forbidding its members to play or contract for recordings or any mechanical reproduction of music. See Hearings before Subcommittee of Senate Committee on Interstate Commerce, 77th Cong., 2d Sess., pursuant to S. Res. 286, *Use of Mechanical Reproduction of Music,* pp. 1–5 (hereinafter cited as 1942 Hearings). Efforts of the Director of the Office of War Information and of the Chairman of the Federal Communications Commission to have the ban lifted proved unavailing. *Id.*, at

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[4] Hearings before House Committee, 79th Cong., 1st Sess., on S. 63 and H. R. 1648, *Interference with Broadcasting of Non-Commercial Educational Programs* (hereinafter cited as 1945 Hearings).

[5] *Id.*, at p. 13.

[6] *Id.*, at p. 67.

8, 49. The interests of these governmental agencies in the question resulted from the dependence of several hundred small independent radio stations on mechanical transcriptions, the need for the continued existence of these stations as media of communications, and the importance of recorded music to the morale of servicemen and war workers. *Id.*, at 6–7. A survey by the Federal Communications Commission at that time revealed that 76% of all radio programs included music (*id.*, at 18–20), that 42.6% of all radio time was devoted to programs including recorded music (*id.*, at 21), and that the recordings were employed much more extensively by the smaller and less prosperous stations (*id.*, at 23–35).

When the ban on recordings and electrical transcriptions was still in effect after six months despite the efforts of the administrative officials, the Congressional Committee hearings were reopened.[1] Mr. Petrillo admitted to the Committee that he had not made any demands on the recording companies or anyone else but had merely ordered that they be closed down.[2] At the instance of the Committee, Petrillo subsequently announced his demands that the recording companies pay a specified sum per record to the union, for an Employ[illegible] Fund, and the com-

[1] 1943 Hearings, *supra*.
[2] *Id.*, at 49.

panies were forced to accept it.[9] Subsequently the Federation disregarded orders of the National War Labor Board and of the President of the United States that the ban on recordings, except in accordance with the Union's terms, be rescinded. See 1945 Hearings, pp. 16, 78, 92 Cong. Rec. 1549.

Other types of orders issued by the appellee have forbidden musicians to appear on any television program, or any program broadcast on both frequency and standard modulation unless twice as many musicians were paid.[10] The ban on television is not part of a collective bargaining arrangement but is an outright unconditional order issued to all musicians.[11]

The evidence before Congress showed not only that the Federation of Musicians possessed a monopoly power over the musical industry but that its peculiar constitution in fact vested uncontrolled power in one man, its president. All contracts with the Union are expressly made "subject to the constitution, bylaws, and rules of the union". 1945 Hearings, at p. 68. Article I of the bylaws of the Federation, set forth at greater length in the note below and in its entirety in the Transcript of Record in No. 731, *Bartels* v.

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[9] The controversy as to recordings is described in *Electrical Transcription Manufacturers and American Federation of Musicians*, 16 War Labor Reports 369, and in 1945 Hearings, pp. 74–78.

[10] 1945 Hearings, pp. 17, 86, House Report No. 1508, 79th Cong., 2d Sess., p. 5, quoted *infra*, p. 165.

[11] 1945 Hearings, at p. 86.

Birmingham, pp. 592–593,[12] empowers the president of the Union not only to "enforce the constitution, bylaws, standing resolutions, or other laws, resolutions, or rules of the federation," but also to "annul and set aside same or any portion thereof, except such which treat with the finances of the organization and substitute therefor other and different provisions of his own making" (*Id.*, pp. 20, 68; H. Rep. 1508, 79th Cong., 2d Sess., p. 2, *infra*, p. 160). The House Committee Report stated (p. 2):

> In most cases demands of the character dealt with by this proposed legislation have been made on behalf of the American Federation of Musicians by James C. Petrillo, its president.

* * * * *

[12] "It shall be his duty and prerogative to exercise supervision over the affairs of the federation; to make decisions in cases where, in his opinion, an emergency exists; and to give effect to such decisions he is authorized and empowered to promulgate and issue executive orders, which shall be conclusive and binding upon all members and/or locals; any such order may by its terms (a) enforce the constitution, bylaws, standing resolutions, or other laws, resolutions, or rules of the federation, or (b) may annul and set aside same or any portion thereof, except such which treat with the finances of the organization and substitute therefore other and different provisions of his own making, in which case such change shall be published in the next issue of the International Musician after its promulgation; the power so to do is hereby made absolute in the president when, in his opinion such orders are necessary to conserve and safeguard the interests of the federation, the locals and/or the members; and the said power shall in like manner extend to and include cases where existing laws are inadequate or provide no methods of dealing with a situation." 1945 Hearings, p. 20.

> The federation thus composed is so organized that its membership has little control over its management or policy.

A member of the Federation, who was protesting against the appellee's ban on the broadcasting of music from the National Music Camp at Interlochen, Michigan, stated before the Congressional committee (1945 Hearings, at p. 21):

> The question is frequently asked "Why do the members of the A. F. of M. support this high-handed czar of American music?" The answer is that they are afraid of his vengeance, for he has the power to expel any member of any local without reason and without trial. No musician who is dependent upon musical performance for a livelihood can afford to incur the displeasure of boss Petrillo, for no such musician can secure employment unless he is a member of the A. F. of M. The members of the A. F. of M. enjoy about the same measure of freedom as the members of Hitler's Reich. They obey him, or else.
>
> At a faculty meeting at the Interlochen last summer the A. F. of M. members pointed out to me that if I continued to protest the Petrillo broadcast ban Petrillo would punish them for being associated with the institution. Their fear was well founded. Mr. Petrillo has punished them by his edict of January 19, forbidding them to earn their summer livelihood at the camp hereafter.

None of this testimony before the Congressional committee was contradicted. The Federation and the appellee were invited to appear but refused. 1945 Hearings, 121–122, 126. Congress was accordingly entitled to accept as true the testimony introduced at the hearing as to the Federation's activities.[13]

There is ample evidence in the Committee Report and the Congressional debates that when it passed the Lea Act, Congress was concerned with the monopolistic power of the Federation of Musicians and its president. H. Rep. No. 1508, pp. 1–2 *infra*, pp. 158–160; 92 Cong. Rec. 1544, 1547, 1549, 1555, 1556, 1557, 1558, 3253.[14]

B. *The detrimental effect of the Federation's monopoly power on interstate broadcasting*

Radio broadcasting is an interstate industry subject—and subjected—to Federal regulation under the Commerce Clause. This Court has

[13] In its briefs and arguments in the court below appellee made many self-serving statements of fact for the purpose of showing the reasonableness of his conduct and refuting the evidence presented before the Congressional committees. The place for such statements and arguments was before the Congressional committee. Congress was warranted in basing its legislation upon its understanding of the situation presented to it, particularly in view of the Federation's refusal to appear. Contrary self-serving statements by appellee as to matters of policy, which are neither found in the legislative records nor in the record of this case, and the truth of which is plainly not judicially noticeable cannot be relied upon in this Court in determining the constitutional issues here involved.

[14] References to dictatorship, dictatorial powers and tyranny, in an economic context, connote monopoly power in aggravated form.

recognized (*National Broadcasting Co.* v. *United States*, 319 U. S. 190) that the Communications Act is designed to establish a system of radio broadcasting which would "secure the maximum benefits of radio to all the people of the United States" (p. 217).

> The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470, 475. [*Id.*, at 216.]

The Lea Act amends the Communications Act in order to further the attainment of its objectives.

That the practices of the Federation and the appellee have interfered with the fullest utilization of radio service is undeniable. We have already referred to the ban on television and the refusal to permit broadcasting on both standard and frequency modulation without double payment.[15] These directly interfere with new and improved methods of broadcasting:

[15] Representative Rivers stated during the debate in the House that Petrillo "has it in his power to kill once and for all frequency modulation. It is dead if Petrillo continues. He has already issued a dictate that no band in the Nation may appear on television for any purpose. If he continues, television is dead and buried." 92 Cong. Rec. 1558.

The enforcement of the latter demand illustrates the abuse at which the portion of the Act here involved was aimed. The House Committee Report (No. 1508, 79th Cong., 2d Sess., p. 5, *infra*, p. 165)

> * * * a wire from Mr. Petrillo to the networks in October 1945, as follows:
>
> "This is to advise you that after the meeting between your company and the American Federation of Musicians held in my office the matter was further discussed and we came to the final conclusion that beginning Monday, October 29, 1945, wherever musicians play for FM broadcasting and AM broadcasting simultaneously the same number of men must be employed for FM broadcasting as are employed for AM broadcasting, which means a double crew must be employed. Kindly govern yourself accordingly."

The Committee Report then proceeds:

> The absurdity of such a demand is apparent. Two orchestras required for simultaneous broadcast would be an anomaly. It is reported that 1 of the networks has a staff orchestra of 95 pieces and compliance with this order would require the employment of 190 musicians to needlessly duplicate and embarrass the work of one orchestra.

The Chairman of the Federal Communications Commission, testifying before the House Commit-

tee on Interstate and Foreign Commerce in relation to the ban of musical broadcasting by educational organizations stated. (1945 Hearings, p. 12):

> * * * this action of the American Federation of Musicians results in a severe restriction being imposed upon what may be broadcast over the air. Under the American system of broadcasting, as you know, the Government is expressly forbidden to dictate to broadcasters what shall and what shall not be broadcast. This is in order to guarantee a free radio. But more than this is necessary if radio is really to be free. We must make sure that no arbitrary restrictions are imposed by private groups concerning material which shall be broadcast. It is the Commission's constant endeavor to see that the radio industry keeps itself as free as possible of all unreasonable fetters so that radio stations are in a position to discharge their obligation of operating in the public interest. Radio's ability to fulfill this obligation is hampered fully as much when its freedom of action is imposed by a labor organization as when it is self-imposed. * * *
>
> The second evil is found in the effect of the American Federation of Musicians' action on small stations. We all are familiar with the fact that most professional talent is concentrated in the large cities. For the small station this means that it must to a great extent rely on amateur talent which it can find or develop in the

> community. Many of these communities have a good deal of latent talent that can be developed to the benefit both of the talent and the community; this is particularly true of communities which have universities located nearby. However, the action of the American Federation of Musicians prevents radio stations from using musical talent of this kind, * * *.

There were many illustrations presented to the House Committee as to the evil at which paragraph (a) (1) of the Lea Act, here involved, was directed—the forced hiring of more persons than are economically necessary or justifiable.

The Federation of Musicians established a quota system prescribing the number of musicians each radio station was required to hire. With respect to one of these demands, it was testified that a regional hearing officer of a National War Labor Board panel had found (*id.*, at 72):

> * * * * * *
>
> It is first of all clear that radio station WOV has no need for and cannot use 12 musicians. The requirement that it must hire 12 musicians at all times is thus "make-work" or "feather-bedding" rule which insures a weekly wage to a number of men who do virtually nothing to earn it except to belong to the musicians' union. * * *[16]

[16] Although the recommendation of the hearing officer was rejected by the Regional War Labor Board, the Board did not question the findings of fact. *Radio Station WOV*, 22 War Labor Reports 744.

An official of a Chattanooga broadcasting company in referring to a demand that it employ seven musicians stated that (*id.*, at 125):

> * * * We made it very clear that we needed the services of none of these men, and the union representatives were frank enough to admit this. Their position was, however, that since we used programs originating with the Columbia chain where union musicians were employed, we must pay tribute to the local union because their employment had been disturbed by the use of Columbia chain programs. They stated that they had no desire to make a War Labor Board case, but preferred to have their national organization bring pressure upon the Columbia chain with a threat of having Station WDOD deprived of Columbia chain programs.
>
> The gist of the whole situation locally is that we do not need the services of these men. They admit we do not, but they are attempting to force us to employ them in spite of the fact that they are employed at various other places in the city of Chattanooga both as musicians and in other lines of employment * * *

The quota demands of individual stations were enforced by threats to boycott the network with which the station was connected (*id.*, at 70).

> * * * When the union desired to have a station affiliated with a network hire more

> men, it notified the network that if the network continued to transmit programs to the station, a strike would take place against the network which would prevent the transmission of any programs using instrumental musicians to any of the stations on the network. In many cases, the network, faced with the alternative of depriving one station of network service, or, being unable to broadcast musical programs to all of its stations, has appealed to the station to settle its dispute with the A. F. M. * * *.

In order to force a Rochester station to hire musicians "a strike had been called depriving an entire network, and all of its hundreds of stations, of any musical services, and * * * this strike had been ended only on the withdrawal of network service from the station". 1945 Hearings, at 71. "The station employed no musicians, said that it could not get any, and didn't need any". *Ibid.*

Another illustration relates to "platter turners". "This term relates to the function of placing phonograph records and electrical transcriptions on turntables and placing the needle in the groove so that the record can be played. Such work everywhere else in the country was done by persons who were already present in the studio in connection with another function. In most cases it was done by a studio engineer, who was already in the studio in order to control the volume of the record as it was broadcast. In some

other cases it was done by announcers, who announced the name of the selection and artist in connection with placing the recording on the turntable. Stations owned and operated by networks used engineers for this purpose." *Id.*, at 80.

Although he had previously admitted to the Congressional Committee in 1943 that such a demand "is not sound" (*ibid.*), the appellee insisted that all networks must employ as platter turners only members of the American Federation of Musicians. The Union's official journal announced that "members doing this work would only do that work and nothing else and would not be permitted to play a musical instrument." *Id.*, at 81.

With respect to this demand, a witness testified (*id.*, at 82):

> Platter turning is no more a full-time job for anyone than would be the placing of paper in a typewriter as separate from stenography. It is a mere incidental amount of time, and which always has been done, and can be easily be done by the persons who are already occupied in the studio in connection with the program being broadcast. It must be remembered that the average station is on the air for about 17 hours a day for 7 days a week. During this time there is no extensive period when some type of recording will not have to be handled. Sometimes it may be a Government

appeal, sometimes a commercial spot announcement which runs only for a minute, sometimes a 15-minute recorded show.

In order to have musicians available as platter turners through all of this period, every broadcasting station would have to employ a number of shifts of platter turners, and Mr. Petrillo's figure of 2,000 "make work" jobs for such activity is, therefore, a conservative one. To employ high-priced union musicians to sit idle except for the occasional placing of a record upon a turntable is wasteful and uneconomic for all broadcasting stations and would deteriorate the public service rendered by broadcasting. For the smaller stations, however, much forced hiring would be completely ruinous.

The Committee inquired as to whether other unions engaged in the same type of practice. The witness (a representative of the broadcasters and probably not well qualified to answer the question) stated that in his opinion they did not, and observed that "you can again quote from the president of the American Federation of Musicians in his testimony before the Senate when he said that it is not every union that can demand these things or is strong enough to demand them." 1945 Hearings, pp. 101–102.

That such demands could properly be regarded by Congress as impairing the ability of radio stations to serve the listening public hardly needs demonstration. Among the factors which the Federal Communications Commission con-

siders in issuing licenses to broadcasters is their financial ability to make good use of the assigned channel. See Federal Communications Act, Sec. 308 (b), 47 U. S. C. 308 (b); *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, 475. To require broadcasters to expend their assets in paying more employees than they need—something which they normally would do in the absence of some form of coercion—diminishes the resources available for giving the public the best possible programs. In particular, such demands may affect the very existence of the large number of small stations with small resources upon which a substantial portion of the nation depends. See pp. 19, 26–27, *supra*. If the broadcasters comply with the demand for unneeded employees, their capacity to furnish the community with other useful services, such as non-remunerative programs, will obviously be impaired. If they do not comply they will, at the very least, be unable to provide the public with the musical entertainment which it desires, and in many instances, as Congress was aware (see pp. 28–29, *supra*) be forced by outside pressure to shut down altogether. The House Committee found (H. Rep. No. 1508, 79th Cong., 2d Sess., p. 3 *infra*, p. 162):

> * * * The amount of money extorted from the broadcasting industry by these methods, without moral right, has reached millions of dollars in amount and if demands now pending were granted it

would, by these racketeering and extortion methods, require the broadcasting industry to pay tribute probably much in excess of $20,000,000 a year for peace against these boycotts, strikes, and threats.

The broadcasting industry has been surrendering to these demands for tribute to avoid the greater losses that would result from failure to comply.[17]

There is thus ample basis for the conclusion of the Committee that to subject the industry "to

[17] Appellee has urged below that this estimate was excessive and in disregard of amounts ascertainable from the records of the Federal Communications Commission. These records, which are referred to in 1945 Hearings, p. 69, relate only to staff musicians employed by the radio stations themselves. They also not include the "large part of the revenue derived directly from radio by members of the A. F. of M. [which] results from the employment of musicians by the sponsors of commercial radio programs" (1945 Hearings, p. 66), or the amounts paid by hotels, restaurants, and the like to orchestras whose programs are broadcast, or the amounts paid by broadcasters to recording companies who in turn employ musicians. *Ibid.* The Commission reports disclosed that in 1944 over $10,000,000 was paid to staff musicians. *Id.*, at 69. The War Labor Board estimated that in various forms radio paid musicians $30,000,000. *Id.*, at 65–66; *Electrical Transcription Mfrs.*, 16 War Labor Reports 369, 381. Obviously no one can prophesy with accuracy how much the practices outlawed by this statute would cost the industry as a whole in the future. There is no reason to doubt that the amount will be substantial, and this is all that is material here. See 1945 Hearings, p. 77, which cites appellee as stating that the royalties on the recordings to be paid to the Federation would "during wartime, while there was a ceiling price on records and a limitation on the number of records which could be manufactured * * * aggregate *only* $4,000,000 a year." [Italics supplied.]

extortionate demands enforced by coercive methods" would "increasingly threaten to restrict and handicap it in performing its rightful functions to the Nation". H. Rep. 1508, 79th Cong., 2d Sess., p. 2 (*infra*, p. 158). The statute thus represents a legislative effort to protect the public's interest in good radio service. Since radio is interstate, this is clearly a legitimate Congressional objective under the Commerce Clause. And it can hardly be claimed that the particular course which Congress chose to follow bears no relation to the end which it sought to achieve.

II

CONGRESS' POWER TO PUNISH MONOPOLIES AND RESTRAINTS OF TRADE IN INTERSTATE COMMERCE MAY VALIDLY BE BROUGHT TO BEAR AGAINST LABOR UNIONS

That Congress has authority, in the exercise of its commerce power, to regulate and prohibit monopolistic practices affecting interstate radio broadcasting would seem too plain for argument. Cf. *National Broadcasting Co.* v. *United States*, 319 U. S. 190. Previous attempts of the executive department to obtain judicial relief from the coercive practices of the American Federation of Musicians have been fruitless, not because the Federal Government lacks constitutional power but rather because of the limitations imposed by Congress in the Clayton and Norris-LaGuardia Acts. *United States* v. *American Federation of Musicians*, 318 U. S. 741. When this case was

called to the attention of Congress while it was considering the legislation with which we are here concerned, it was made plain that the decision had been based on "laws * * * passed by Congress," which Congress, presumably, could change. 1945 Hearings, pp. 87–88.

This Congressional assumption that its power to punish restraints of interstate commerce extends to restraints imposed by labor is firmly grounded in the decisions of this Court. In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, this Court explicitly stated (p. 488), that "Whether labor organizations and their activities are wholly excluded from the Sherman Act is a question of statutory construction, not constitutional power." And the opinion read as a whole indicates plainly that the Court did not doubt the power of Congress to control "strikes or agreements not to work" (310 U. S., at 503) restraining interstate commerce, but was holding only that such strikes in themselves did not necessarily violate the Sherman Act. And, just as clearly, in *United States* v. *Hutcheson*, 312 U. S. 219, the ruling that a jurisdictional strike did not violate the antitrust law, was based on the fact that "Congress in the Norris-LaGuardia Act has expressed the public policy of the United States * * * in order to 'obviate the results of the judicial construction' theretofore given the Clayton Act." 312 U. S., at 234. The emphasis in the opinion is entirely

upon the importance of conforming to Congressional policy. If labor were to "combine with non-labor groups" (p. 232), the opinion declared, the antitrust law would still be applicable—although a strike in such a situation might be just as peaceful and in the self-interest of the strikers as in any other.

This statement in the *Hutcheson* opinion was followed in *Allen-Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797, in which the Court recently held a combination of labor and employers to raise prices and monopolize the market to be a violation of the Sherman Act. Apart from the fact that the union in that case was cooperating with the employers, a factor which the opinion clearly indicates is of no *constitutional* significance (see *infra*, p. 38), the practices of Local No. 3 were quite similar to those of the American Federation of Musicians. Local No. 3 had a tight monopoly of the manufacture and installation of electrical equipment in New York City.[18] In order to maintain its monopoly and "to enlarge employment opportunities for its members" (325 U. S., at 799), the electrical workers union went so far as to require manufactured equipment brought into New York "to

[18] Our statement of the facts of the *Allen-Bradley* case is taken both from this Court's opinion and from the opinion of the Circuit Court of Appeals (145 F. 2d 215), to which this Court referred (325 U. S., at 798) for a more detailed statement of the facts.

be unwired and rewired" by its members before installation (145 F. 2d, at 218), clearly a method of forcing the employment of unneeded labor not basically different from that availed of by the Musicians' Union. "In the course of time, this type of individual employer-employee agreement expanded into industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control" (325 U. S., at 799–800). This goal of barring all outside electrical equipment from New York City was accomplished "by the traditional labor weapons of refusal to work upon disfavored goods, with peaceful and non-violent persuasion, picketing, and blacklisting, and now the active participation of the local employers" (145 F. 2d, at 219). There was "a specific finding that there was no evidence of any violence or any threat of violence against any of the plaintiffs by any of the defendants" (145 F. 2d, at 219n).

This Court held the conduct of the union unlawful because of the association with non-labor groups. It required the district court to modify its injunction, which had restrained peaceful picketing, boycotting and striking, "so as to enjoin only those prohibited activities in which the union engaged in combination 'with any person, firm or corporation which is a non-labor group * * *'" (325 U. S., at 812).

The Court thus clearly sanctioned an injunction which forbade peaceful striking and picket-

ing by a union acting in its own self-interest, when acting in combination with other groups. The fact that the union had combined with some employers in its activities does not, of course, change the inherent nature of its conduct in coercing—peacefully but effectively—other employers.

The factor of employer cooperation, though of importance under the Sherman Act, clearly has no constitutional significance. The opinion recognizes this in replying to the criticism contained in Mr. Justice Roberts' separate opinion that its holding meant that a union could accomplish the same end if it did not act in combination with business groups. In this connection the opinion states (325 U. S., at 810):

> This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress. *Apex Hosiery Co.* v. *Leader, supra.*

There can therefore be no question that the Court would have sustained an injunction against the same type of conduct, designed to restrain trade in the same way apart from employer participation, if it had thought that Congress had so provided.

That the same types of conduct may constitute a crime under the Sherman Act is also shown by

United Brotherhood of Carpenters, et al. v. *United States*, Nos. 6–10, decided March 10, 1947, in which the *Allen-Bradley* case was followed.

The power of Congress to deal with restraints of trade by labor is not, of course, exhausted by the Sherman Act. Congress may partially remove the exemptions from the antitrust law by special legislation for particular industries in which it thinks abuses exist, without having to repeal them generally. And that, in substance, is what Congress has done in Section 506 of the Communications Act. Apart from the Norris-LaGuardia and Clayton Acts appellee's activities might well have been deemed a violation of the Sherman Act itself. The decision that the Sherman Act did not apply in *United States* v. *American Federation of Musicians, supra,* was based entirely upon the Norris-LaGuardia Act, and the history of the present statute shows that Congress meant to overturn that decision. The power of Congress to remove an exemption which it has created can scarcely be denied.

The *Allen-Bradley* case is, we submit, decisive as to the constitutional power of Congress to prohibit activities of labor unions, including striking and peaceful picketing, which restrain or monopolize interstate commerce, and thus is dispositive of the issues raised as to the constitutionality of the Lea Act as applied to striking

and picketing. Nevertheless, in the face of the *Allen Bradley* case, appellee contends that Congress was without power to punish the coercive acts with which he is charged. We turn now to a specific analysis of the various aspects of appellee's challenge to the constitutional validity of the Lea Act.

III

APPELLEE HAS NO CONSTITUTIONAL RIGHT TO DIRECT AND CAUSE OTHER PERSONS TO DISCONTINUE OR NOT TO ACCEPT EMPLOYMENT

A. *Neither the Thirteenth nor the Fifth Amendment protects a right to order other persons not to work*

Appellee contends that the statute is invalid in that it restricts the right to strike contrary to the Thirteenth Amendment, which prohibits "involuntary servitude" (Br. 43–52), and contrary to the Fifth Amendment which prohibits deprivation "of life, liberty or property without due process of law" (Br. 59–65).

In support of this position appellee argued below (Br., p. 43) that "the information charges the discontinuance of employment as a crime." But the information charges no such thing. All that the information charges is that appellee attempted to coerce Station WAAF by "directing and causing" "other persons" to discontinue their employment and not to accept employment. Appellee is not thus being prosecuted for quitting

work or for refusing to work for WAAF. The information alleged, and appellee has admitted, that he is the president of the American Federation of Musicians, and it has not been suggested by appellee, or alleged by the Government, that he ever worked for Station WAAF, refused to work for that station, or had any intention of working there. Obviously he had not.

Accordingly, the appellee's claim can only be that he has a constitutional right protected by the Thirteenth and Fifth Amendments to order other persons not to work. No question as to the right to strike is raised by the information, and this Court is not called upon to determine hypothetical constitutional issues not presented by the facts of this case.[19]

The recent decision of this Court in *United States* v. *United Mine Workers*, Nos. 759-760, decided March 6, 1947, suffices to dispose of the contention that a labor leader has a constitutional right to order others to refrain from work. In that case the district court had restrained the president of the United Mine Workers, as well as the Union itself, from "coercing, instigating, inducing, or encouraging the mine workers at the bituminous coal mines in the Government's pos-

[19] We shall consider below (*infra*, pp. 133 *et seq.*) appellee's attempt to broaden the issue on the ground that the Lea Act must be treated as an inseparable whole which must be held unconstitutional in its entirety if any application might be invalid.

session, or any of them, or any person, to interfere by strike, slow down, walkout, cessation of work, or otherwise, with the operation of said mines by continuing in effect the aforesaid notice or by issuing any notice of termination of agreement or through any other means or device" (slip sheet, p. 6). This Court upheld the authority of the district court to issue such an injunction. The prohibition contained in the injunction against inducing workers to interfere by "strike" or "cessation of work" or "otherwise" with the operation of the mines is indistinguishable constitutionally from the offense charged in the information that appellee "directed and caused" other persons not to work for Station WAAF.

The defendants in the *United Mine Workers* case contended that the injunction issued by the district court violated the Thirteenth Amendment, for the same reasons as are urged here. See brief of *United Mine Workers of America and John L. Lewis*, Nos. 759–760, pp. 50–54. This Court did not consider the point substantial enough to warrant discussion in its opinion. With respect to it, the Court declared merely that "we have examined the other contentions advanced by the defendants but have found them to be without merit" (slip sheet, p. 16).

Clearly if the district court had power in the *United Mine Workers* case to order the defendants not to induce others to strike or to refrain from working without violating any constitutional

guaranty, Congress has at least the same power.

We submit that the contention that the Thirteenth Amendment protects a person in his right to order others not to work warrants the summary treatment accorded it in the *United Mine Workers* case. That Amendment provides that "neither slavery nor involuntary servitude * * * shall exist within the United States". The language and the familiar background of the Amendment demonstrate, if proof be needed, that it does not give constitutional protection to a "right" to order other persons not to work. No case under the Amendment supports any such claim.[20] The suggestion that the president of the

[20] The cases under the Amendment are: *Pollock* v. *Williams*, 322 U. S. 4; *United States* v. *Gaskin*, 320 U. S. 527; *Taylor* v. *Georgia*, 315 U. S. 25; *Corrigan* v. *Buckley*, 271 U. S. 323; *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170; *Butler* v. *Perry*, 240 U. S. 328; *United States* v. *Reynolds*, 235 U. S. 133; *Bailey* v. *Alabama*, 219 U. S. 219; *Hodges* v. *United States*, 203 U. S. 1; *Robertson* v. *Baldwin*, 165 U. S. 275; *Plessy* v. *Ferguson*, 163 U. S. 537; *Civil Rights Cases*, 109 U. S. 3; *Slaughter-House Cases*, 16 Wall. 36. See also *International Brotherhood of Elec. W.* v. *Western U. Tel. Co.*, 6 F. 2d 444 (C. C. A. 7), affirming a temporary injunction prohibiting the union from engaging in strikes and other activities to compel an employer building contractor to breach its contract with the Western Union Company under which the latter's employees (non-union) installed call boxes in buildings under construction. The court rejected the contention that the decree violated the Thirteenth Amendment by forcing the union men to work against their will side by side with non-union men. After a trial the injunction was made permanent. *International Brotherhood, Etc.* v. *Western U. Tel. Co.*, 46 F. 2d 736 (C. C. A. 7), certiorari denied, 284 U. S. 630.

American Federation of Musicians is being subjected to slavery or involuntary servitude by a statute which restricts his dictatorial powers over others is obviously absurd.

Nor does the appellee have any greater rights under the provision of the Fifth Amendment which prohibits the deprivation of "liberty * * * without due process of law." Since appellee cannot complain that *he* is being deprived of liberty to work or not to work for whom he chooses, the case does not involve the question whether the Due Process Clause gives a person an absolute right to work or not work as he sees fit. Appellee is reduced to arguing that he has a constitutionally protected liberty to order other persons to refrain from working.

The freedom to interfere with the working relations of others certainly rises to no higher constitutional level than, for example, the freedom to enter into working relations on any terms one chooses, a freedom which has been held subject to legislative control without violation of the Due Process Clause. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 391–393, and cases cited; *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 558; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 43–45; *United States* v. *Darby*, 312 U. S. 100, 125. As the Court declared in upholding the validity of minimum wage legislation (*West Coast Hotel Co.* v. *Parrish*, 300 U. S., at 391):

> [The Amendment] speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. * * *, the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

(p. 392:)

> * * * There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 567.

The question of substantive due process here presented is therefore merely whether the statute is reasonable in relation to its subject, whether it bears a reasonable relation to a subject with

which the legislative may deal. We have demonstrated in Point I, *supra*, that the statute is reasonably related to the lawful Congressional objective of preventing the "wasteful use" of the facilities of interstate radio (*supra*, p. 24). In seeking to attain this objective Congress was not acting arbitrarily or unreasonably in prohibiting the coercion of radio licensees to employ more persons than they need to perform actual services; such a demand on its face would compel a waste of financial resources which could be used to public advantage. Many courts have held such demands unlawful even in the absence of a statute.[21] It certainly cannot become unconstitutionally arbitrary or unreasonable for the federal legislature to adopt the same policy.

Clearly if Congress has the power to protect radio licensees from being coerced into such wasteful practices, it can prohibit any and all means of coercion, including the ordering of other persons to refrain from working for the radio licensee.

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[21] *Lafayette Dramatic Productions* v. *Ferentz*, 305 Mich. 193, 9 N. W. 2d 57 (1943); *Opera on Tour* v. *Weber*, 285 N. Y. 348, 34 N. E. 2d 349; certiorari denied, 314 U. S. 615; *Haverhill Strand Theater* v. *Gillen*, 229 Mass. 413, 118 N. E. 671; *Benito Rovira Co., Inc.* v. *Yampolsky, et al.*, 187 N. Y. Supp. 894 (Sup. Ct. N. Y.); *Welinsky* v. *Hillman, et al.*, 185 N. Y. Supp. 257 (Sup. Ct. N. Y.). Contra: *Scott-Stafford Opera House Co.* v. *Minn. Ass'n*, 118 Minn. 410, 136 N. W. 1092; *Empire Theater Co.* v. *Cloke*, 53 Mont. 183, 163 P. 107. For a discussion of a related problem, see Teller, *Focal Problems in American Labor Law—Opera on Tour, Inc.* v. *Weber*, 28 Va. L. Rev. 727, 742 (1942).

B. THE ACT IS NOT AN UNCONSTITUTIONAL INTERFERENCE WITH ANY *RIGHT TO STRIKE*

Appellee treats the case as if the worker's right to strike is indistinguishable from the right of another to order him to strike, and argues that the limitation on the right to strike imposed by this statute is unconstitutional. Although we do not think the issue properly before the Court, we do not wish the contention to go unanswered. In addition, the governing principles and the authorities dealing with the right to strike have a bearing on the following section of this brief, which is concerned with the right to picket.

1. *Basic principles*

That the right to strike is not absolute is not only shown by a vast number of decisions in this Court and in state and lower federal courts which have held particular strikes to be unlawful at common law or under the Sherman Act, but is conceded by appellee.

This Court, speaking through Mr. Justice Brandeis, dealt with the constitutional contention in *Dorchy* v. *Kansas*, 272 U. S. 306. In that case a union had called a strike in violation of a state statute in order to compel the employer to pay a disputed wage claim to one of its members who had formerly been employed. The objective of securing payment of wages claimed to be due would seem to be in the economic self-interest of the union and its members. The contention was

that a state criminal proceeding against the leaders of the union was barred by the United States Constitution. We quote in full the paragraph in which Mr. Justice Brandeis, speaking for a unanimous Court, rejected this contention (272 U. S., at 311):

> The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. Compare *Guaranty Trust Co.* v. *Green Cove R. R.*, 139 U. S. 137, 143; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109. To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. Compare *People* v. *Barondess*, 16 N. Y. 436; 133 N. Y. 649. And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.

Compare *Aikens* v. *Wisconsin*, 195 U. S. 194, 204–5.

Although the *Dorchy* opinion only adverts specifically to the Fourteenth Amendment, it is equally inconsistent with any notion that the right to strike is constitutionally protected by the Thirteenth.

The above quotation is extremely significant here. Not only does it deny that the Constitution "confers the absolute right to strike". It holds that "however orderly the manner in which it is conducted" "a strike may be illegal because of its purpose", that a strike may be coercive, and that (p. 311) "The legislature may make such action punishable criminally, as extortion or otherwise. * * * And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike." All these observations are appropriate in connection with this case.

The *Dorchy* decision was in line with the view previously expressed by Mr. Justice Brandeis in his dissent in *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 488, wherein he said:

> Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any *constitutional*

> or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat. [Italics supplied.]

This Court has in no way departed from the *Dorchy* case in its recent decisions. On the contrary it has reaffirmed the views of Mr. Justice Brandeis. The question has arisen most frequently in cases under the Sherman Antitrust Act since that is the primary federal statute which generally prohibits restraints on interstate commerce.

The Sherman Act cases relevant here have been discussed *supra*, pp. 35–39. They serve to make plain the Congressional power to prohibit restraints of interstate trade even when the moving force is a labor union. The *Allen-Bradley* case, in particular (325 U. S. 797), demonstrates the power of Congress to ban such restraints even

when that ban means a prohibition on strikes and picketing. Since, as these authorities show, the right to strike is not absolute, it follows that strikes may in some circumstances be made unlawful. What those circumstances are is obviously a matter of policy, to be determined by the legislative branch of the Government, subject to the Due Process limitation that they not act arbitrarily or in a manner without reasonable relation to a legitimate legislative objective. See pp. 44–46, 55–58.

It can hardly be denied that Congress was not unreasonable in concluding that the featherbedding or make work demands of the Federation of Musicians are inconsistent with the public interest in good broadcasting. Such demands might have been "lawful", "legitimate", or "proper" under preexisting statutory or common law, on the theory that it was justifiable for labor to make demands so long as it was acting peaceably and in its economic self-interest. But such a test does not have constitutional stature. The quoted words, which have been used freely by appellee in this case, embody policy concepts and have been used by the courts in determining, under the common law and other statutes, what conduct should be enjoined in labor disputes. These cases arose in fields in which the courts were left at large to determine such questions of policy. But normally it is the function of the legislature to determine what is lawful and

legitimate, and we believe that the Federal legislature has the right to determine national policy on such matters as well as on others. The questions with which we must be concerned in this case are not whether appellee's conduct was "proper" or "legitimate" or "lawful" in the abstract, but whether there is anything in the Constitution of the United States which precludes Congress from making it unlawful whether it was before or not.

Appellee's argument that it is proper for a union to seek to procure employment for its members, even by make-work devices, affords an illustration of what we mean. Under the common law of some States and under recent statutes such as the Norris-LaGuardia Act a union may not be prohibited from making and enforcing demands which are in the economic self-interest of its members. Although a number of State courts have treated as unlawful the type of demand involved in this case (see p. 46, *supra*), we may assume that a demand for make-work, that an employer hire more workers than he needs, would fall within that category, since it is to the interest of the union to have more members employed. Self-interest, however, is not a test of one's constitutional rights, in the labor field or any other. Legislators may enact laws in the public interest which may interfere with, restrict and injure the self-interest of individuals or groups. To say that

everyone has a constitutional right, with which legislators and courts may not interfere, to act in his economic self-interest as he sees fit would create an economic anarchy not dreamed of in the most extreme days of *laissez faire*. It certainly does not follow that because something will benefit the persons who demand it, a legislature may not prohibit coercion to enforce the demand. It could similarly be said, as to many crimes, that the perpetrators will be benefited by their misdeeds and that the crime was in their economic self-interest. Thus a concept which may be valuable in defining the area in which there shall not be judicial intrusion or when courts are applying general legislative terms is irrelevant to the determination of the legislature's constitutional power.

In its reply brief below (pp. 16–17) appellee stated that he—

> has nowhere contended, and does not now contend, that the right to strike and the right to picket are "absolute" rights. It is elementary that all individual rights are subject to varying degrees of reasonable restraints and limitations in the interest of the public welfare, and there is nothing whatever in the defendant's entire brief that suggests otherwise.

Appellee's position is that peaceful striking or picketing cannot be prohibited unless the purpose of the strike is unlawful, and that the purpose is not unlawful when the victim can agree to the demands without himself violating any law. Appel-

lee relies in particular on paragraph (c) of the Lea Act, which provides that:

> The provisions of subsection (a) or (b) of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed.

From this appellee argues that since the licensee could voluntarily enter into an agreement to hire unneeded employees, a strike to compel him to do so cannot be a strike for an unlawful purpose.

The Lea Act does not make all strikes illegal, but only coercion by any means, including strikes, for specified objectives. Clearly Congress was not making the means alone unlawful, apart from the objective of the strikers. Conversely it is true that the objective is not made unlawful where not sought to be obtained by coercion. It is our position (1) that the constitutionality of the statute is not to be determined by the application of any such elusive verbalism as whether the "means" or the "objective" (or, as here, a combination of both) is made unlawful, and (2) that if "unlawful objective" is a constitutional criterion, the Lea Act nevertheless fully satisfies it.

2. *"Unlawful objective" is not a constitutional test*

The "unlawful objective" test has been developed in common law labor cases as a convenient

device for determining what strikes ought to be enjoined. At common law the activities of labor organizations were regarded as unlawful if either the means or the objective was illegal. Section 6 of the Clayton Act (38 Stat. 731, 15 U. S. C. Sec. 17) recognizes this theory in providing that "nothing contained in the antitrust laws shall be construed * * * to forbid or restrain individual members of such [labor] organizations from *lawfully* carrying out the *legitimate* objects thereof". [Italics supplied.]

But the power of Congress is not to be tested by any such formula. An exercise of the commerce power does not run afoul of due process where "the means chosen are appropriate to the permissible end". *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 558. The ultimate question is whether a statute is arbitrary in relation to a proper legislative purpose. Cf. *United Public Workers* v. *Mitchell*, No. 20, decided February 10, 1947, slip sheet, pp. 18–19, 22.

In so far as peaceful strikes are concerned, a single illustration will demonstrate that the regulatory power of Congress is not confined to an "unlawful objective" test. In the first Railway Labor Act case, *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, the Court clearly implied that the provision in that statute prohibiting for thirty days changes in the conditions out of which the dispute arose was a judicially enforceable limitation upon "the right

to strike". See 281 U. S., at 565, 566. But the strikes forbidden by the Railway Labor Act during the period prescribed for negotiations would normally be for such lawful objectives as improved wages, hours and working conditions.

We have shown that it is proper for Congress under the Commerce Clause to seek to eliminate wasteful monopolistic practices which interfere with the most efficient use of radio facilities, and that it was not arbitrary or unreasonable for Congress to find that coercion to compel the employment of employees not needed had such a deleterious effect. This constitutional goal could not be achieved if the power of Congress does not extend to the coercion exercised by strikes, which are the normal means by which a monopolistic union accomplishes its objectives. Indeed it is clear that Congress deliberately used language broad enough to encompass strikes because it was aware that otherwise "the legislation would fail to accomplish its purpose". H. Rep. No. 1508, p. 6. The Committee Report further states (p. 6, *infra*, pp. 167–168):

> It has been necessary to use the broad language "or by the use or express or implied threat of the use of other means" in order to make the legislation effective. It was necessary to use language broad enough to embrace actual or threatened boycotts and actual or threatened strikes, because these, as well as action or threatened action of like character, could well be

among the means by which the coercion, compulsion, or constraint prohibited by the bill may be accomplished or attempted to be accomplished. If the language were not this broad the legislation would fail to accomplish its purpose:

* * * A strike or threat of a strike is one method by which it is possible to exert or attempt to exert such coercion, compulsion or constraint, and, if it is the method used, the wrongful character of the offense is the same as though other means had been used.

In these circumstances Congress was employing not only an appropriate but an essential means if it was to accomplish a legitimate constitutional end under the Commerce Clause, and its action cannot be deemed arbitrary, capricious or unreasonable. The right to strike, like other rights and liberties, such as contract and property rights, is under the Due Process Clause subject to reasonable regulation in the interest of the community. Liberty of contract: *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 391–3, and cases cited; *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 306–310; *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 558. Property rights: *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *North American Co.* v. *Securities and Exchange Commission*, 327 U. S. 686, 708; *Ruppert* v. *Caffey*, 251 U. S. 264. Right to strike: *Dorchy* v. *Kansas*, 272 U. S. 306; *Allen-Bradley Co.* v. *Local Union*

No. 3, 325 U. S. 797, and the antitrust labor cases preceding the Norris-LaGuardia Act.

3. *The Lea Act satisfies the "unlawful objective" test*

If we accept the "unlawful objective" test, appellee is no better off. Congress has here not made the means, such as striking and picketing, unlawful apart from the unlawful objectives enumerated in the statute. A strike directed at inducing a licensee to accede to a demand that he hire persons he does not need is thus a strike for an unlawful purpose, and nonetheless so because it would be lawful for the licensee to hire more workers if he wanted to. The object of an extortioner or robber is to obtain money from the victim against his will. That object is unlawful, even though it would be entirely within the law for the victim to agree as a matter of contract or gift and without coercion that he give the same person the same amount of money. A monopolistic combination may not, under the Sherman Act, force a competitor to raise prices by oral or other threats of economic reprisal, although the competitor would have a perfect right to raise his prices voluntarily if he saw fit. Under the National Labor Relations Act employers may not force workers to enter into contracts by anti-union threats, although the same contracts would be perfectly valid in the absence of coercion.

It is unnecessary, however, to theorize as to the nature of the "unlawful purpose" for which a strike may be forbidden, for a comparison with the precedents we have cited, as well as with the common law authorities from which the principle is derived, demonstrates the untenability of appellee's argument. The *Dorchy* case itself provides the simplest analogy. This Court there held that a strike called to collect payment of a stale wage claim was for an unlawful purpose and subject to restraint (*supra*, pp. 47–49). But it would not have been unlawful for the union there to have requested that the payment be made, or for the employer to have agreed to make it, or for him to have made it of his own accord. The payment was not unlawful, although coercion for the purpose of obtaining it was. In antitrust cases such as the *Allen-Bradley* case it would not be unlawful for a single employer of his own accord to agree to the union's demands so long as he was not a party to the conspiracy with other employers.

Equally important as showing the meaning of "unlawful purpose" is the common law doctrine that a strike for an unlawful or improper purpose may be restrained. American Law Institute, Restatement of the Law of Torts, Volume IV, pp. 94–95, Section 775; *Dorchy* v. *Kansas*, 272 U. S. 306; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; Oakes, *Organized Labor and Industrial Conflicts* (1927), pp. 376, 424, 433; Frankfurter and Greene, *The Labor Injunction*

(1930), pp. 25–30; 15 C. J. S. 1008. The diversity of opinion as to what purposes should be held unlawful has not interfered with the general recognition of this principle.

Typical cases in which the common law doctrine has developed, and in which courts—though not all courts—have held strikes unlawful, are those involving the validity of demands that an employer cease to use non-union goods or cease dealing with another non-union employer,[22] or that an employer hire more workers or refuse to use labor saving machinery.[23] The cases affording an employer relief from such demands when sought to be enforced by strikes do not suggest that it would be unlawful for him to accept them if he wished, or for him to conduct his business in accordance with them of his own accord. Obviously in such cases, as in most cases in which strikes have been enjoined, it would be entirely

[22] I, Teller, *Labor Disputes and Collective Bargaining*, Section 103 (1940). This treatise declares that decisions in ten states illegalize this type of strike while decisions in eight states hold it valid, and that in California a recent statute has adopted the former view.

[23] *Lafayette Dramatic Productions* v. *Ferentz*, 305 Mich. 193, 9 N. W. 2d 57 (1943); *Opera on Tour* v. *Weber*, 285 N. Y. 348, 34 N. E. 2d 349, certiorari denied, 314 U. S. 615; *Haverhill Strand Theater* v. *Gillen*, 229 Mass. 413, 118 N. E. 671; *Benito Rovira Co., Inc.* v. *Yampolsky, et al.*, 187 N. Y. Supp. 894 (Sup. Ct. N. Y.); *Welinsky* v. *Hillman, et al.*, 185 N. Y. Supp. 257 (Sup. Ct. N. Y.). Contra: *Scott-Stafford Opera House Co.* v. *Minn. Ass'n*, 118 Minn. 440, 136 N. W. 1092; *Empire Theater Co.* v. *Cloke*, 53 Mont. 183, 163 P. 197.

lawful for the employer voluntarily to grant the union's demands.[24]

Furthermore, appellee's argument that paragraph (c) of the Act proves that Congress was not disapproving the hiring of unneeded employees is entirely unrealistic. Congress was aware of the obvious, that it is to the self-interest of the licensee not to employ unneeded personnel. Congress doubtless believed that, with coercion prohibited, licensees could be counted on not to agree to employ more persons than were needed for actual services.[25] The private interest of the licensee could be expected to protect the public

[24] In Frankfurter and Greene, *The Labor Injunction* (1930), it is noted that although Massachusetts holds strikes for a closed shop to be for an unlawful purpose (pp. 28–29; *Folsom* v. *Lewis*, 208 Mass. 336), "an agreement between an employer and the union, voluntarily entered into, whereby the employer promises to hire only union men, or to give them preference, or to give all his work to members of the union will be given legal protection against interference or breach" (p. 30). It is further stated that in Massachusetts "an agreement voluntarily entered into by an employer not to use any non-union made materials is valid, although a strike to enforce such an agreement is beyond the pale" (pp. 29–30). See *A. T. Stearns Lumber Co.* v. *Howlett*, 260 Mass. 45, 60–61. Although the Massachusetts decisions have been criticized, it has never been suggested that they were in violation of the Federal Constitution.

[25] The statute is also inoperative with respect to pre-existing contracts, even though obtained by coercion. Congress deliberately chose not to overturn such arrangements. The licensee would, of course, have an opportunity at the expiration of any such contract to determine for himself whether to agree to a renewal.

interest in avoiding the wasteful use of radio resources. There was, therefore, no reason for Congress to do more than prohibit coercion.

Thus the fact that Section 506 (c) provides that the Section does not make unlawful the enforcement of contracts which might contain conditions which could not under Section 506 (a) and (b) be imposed upon an employer by coercion does not mean that strikes to coerce an employer into accepting the enumerated conditions are not strikes for unlawful objectives. Clearly the statute does not prohibit strikes as such, but only strikes to accomplish particular purposes which Congress thought contrary to the public well-being, and declared unlawful.

That this was the congressional intention appears from the legislative history of the Act. The House Committee Report (H. Rep. No. 1508, 79th Cong., 2d Sess.), declares (p. 4, *infra*, p. 164):

> * * * This bill provides no unjust limitation on the right to strike. The law recognizes the right to strike *for lawful purposes* and in a lawful manner. The right to strike should be exercised as other rights of the citizen. We have the right of free speech but that is not a justification for slander. We have the right to bear arms but that is not a justification of murder. Any person may properly organize *for lawful purposes but criminal purposes are beyond their legitimate function.* [Italics supplied.]

(p 6, *infra*, pp. 167–168):

> This subsection does not prohibit the right to strike or to withhold services, or force individuals to work against their will or desire. It will place no limitation whatever on the use of strikes *for the accomplishment of legitimate objectives,* such as wage increases or better working conditions. The subsection does not prohibit strikes *as such.* What it does do is to prohibit the accomplishment, by actual or attempted coercion, compulsion, or constraint, *of certain unconscionable and wrongful objectives,* regardless of the means used. [Italics supplied.]

Although the debates on the floor of Congress did not reflect unanimity in understanding of the point here involved, the generally expressed view was in accord with the Committee Report.[20]

Representative Lea, Chairman of the Committee, stated in language reflecting the common law rule to which we have referred (92 Cong. Rec. 1550):

> I believe the fundamental principle underlying this question of the right to strike is that a strike is legal and should be so, when it is for lawful purposes carried on by lawful means. That is a perfectly safe, sane, and just thing, but this idea of saying

[20] The Committee Reports are entitled to much greater weight as manifestations of legislative intention than the debates on the floor. *United States* v. *St. Paul M. & M. Ry. Co.*, 247 U. S. 310, 318; *Lapina* v. *Williams*, 232 U. S. 78, 92.

that Congress is powerless to prescribe a rule that prevents a strike being carried on for the purpose of committing a crime it seems to me is just absolutely without foundation in our Constitution or in our law. A crime is no less a crime because it may be committeed by an organized group.

Mr. ROBISON of Kentucky. But if I have understood this bill correctly it does not apply at all unless there is coercion and extortion united.

Mr. LEA. That is right. There must be coercion *and for the unlawful purpose* declared in this bill. [Italics supplied.]

Representative Lea subsequently stated (*id.*, at 1559):

Mr. LEA. If the strike is of coercive character *for those purposes* then it is prohibited by this bill. In other words, to *strike for an unlawful purpose* is unlawful and is prohibited by the bill. [Italics supplied.]

In the Senate, Senator Johnson, who was in charge of the bill, stated (*id.*, at 3244, 3245):

* * * It is as if we would pass a law and say it shall be unlawful to commit murder, and then list the ways one could commit murder, with a bow and arrow, with a shotgun, with an air rifle, with a knife, or other weapon. The bill says one can not coerce or constrain or attempt to coerce or compel or constrain a licensee by any means.

* * * * * *

* * * It is a prohibition against having to hire and pay for more than they need. * * *

p. 3245:

Mr. JOHNSON of Colorado. I yield.

Mr. BALL. Is it the Senator's interpretation of the language in the opening clause of both (a) and (b) "or implied threat of the use of other means, to coerce" that a strike by the musicians' union or any other union around a broadcasting station to compel the employer to sign a contract agreeing to any of these feather-bedding practices, so-called, would be an illegal strike, and those who called it would be in violation of this section?

Mr. JOHNSON of Colorado. Yes, if they attempted to make use of coercion or compulsion or constraint *to accomplish their purpose,* it would be unlawful so far as the six feather-bedding provisions are concerned.

Mr. BALL. Then, a strike certainly is an attempt to coerce. It has gotten a little beyond, I think, merely talking about it, or peaceful persuasion, and a strike to force any of those particular provisions into a contract would then become an illegal strike.

Mr. JOHNSON of Colorado. *But a strike for other purposes, for other objectives, would be perfectly legal* and would not be interfered with in any way by provisions

(1), (2), (3), (4), (5), and (6). [Italics supplied.]

* * * * *

Senator Austin, also a member of the Committee who was active in explaining the bill, subsequently declared (*id.*, at 3248):

> Mr. AUSTIN. Did the Senator ask what was comprehended by the words "other mean[illegible]
>
> Mr. [illegible]OR. Yes.
>
> Mr. [illegible] In the conference we discussed [illegible]se words, and it was definitely understood that they included strikes and boycotts. Is that what the Senator refers to?
>
> Mr. TAYLOR. Persons may not strike——
>
> Mr. AUSTIN. They may not strike in order to gain the advantage of these misdemeanors which are set forth. However, they may strike *for anything which is not unlawful*. With the exception of the nine things which are prohibited in the relationship between the licensee and his artists and between the artists and the reproducers of sound, the nine which are regarded as in conflict with our free institutions and our self-respect, there may be a strike for anything else. There may be a strike for a new contract with reference to wages, with reference to hours, or with reference to anything else except those things which are denounced because they have been proven through experience as being a type

of tyranny which others should not suffer. [Italics supplied.]

* * * * *

Despite the criticism of the opponents of the bill, who made the same point appellee is now urging (92 Cong. Rec. 1554, 3250), the sponsors of the bill were of the view that it made the enumerated objectives unlawful and forbade coercive practices, including strikes, only when aimed at these unlawful objectives. Congress obviously did not believe that the possibility that an employer might agree to such demands if he saw fit was inconsistent with this view. Since the Congressional understanding as to the meaning of a strike for an unlawful purpose was the same as that of the courts in similar situations, as we have seen, there can be no question as to the constitutionality of this application of the unlawful purpose rule. And obviously it is proper for the legislative body, even more than for the courts, to decide what purposes should be considered unlawful.

The many state and lower federal court cases cited by appellee below (brief, pp. 45–52) do not support the proposition that the Constitution protects the right to strike against reasonable legislative limitation. Most of the cases cited were common law authorities not dealing with any constitutional problem. The statements in some opinions that a person has as much right to quit work in concert with others as singly, even

as a statement of common law policy must be contrasted with the many cases, including those in this Court, in which strikes have been enjoined. All of the latter are inconsistent with the notion that the Constitution guarantees the right to strike. Appellee has cited neither decision, dissent nor dictum of this Court in support of its contention.[27] Indeed, this Court, in holding that while merchants have a right individually to refuse to purchase from anyone they please they cannot do the same thing in combination, has stated: "An act lawful when done by one may become wrongful when done by many acting in concert, taking on the form of a conspiracy which may be prohibited if the result be hurtful to the public or to the individual against whom the concerted action is directed" *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 574; *Eastern States Retail Lumber Dealers Assoc.* v. *United States*, 234 U. S. 600, 614; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 440.

[27] *Alabama State Federation of Labor* v. *McAdory*, 246 Ala. 1, 18 So. 2d 810, cited by appellee, held that a state law forbidding all strikes not authorized by a majority of the bargaining unit by secret ballot was unconstitutional because it was a general prohibition covering lawful strikes called for lawful purposes. The State did not appeal to this Court from this portion of the decision, so that problem was not before the Court when it dismissed the union's appeal in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450. To the extent that the decision of the District Court for Kansas in *Stapleton* v. *Mitchell*, 60 F. Supp. 51, goes further, it is inconsistent with the controlling authorities which we have previously cited.

IV

APPELLEE'S RIGHTS UNDER THE FIRST AMENDMENT ARE NOT INFRINGED

The information alleges that the defendant "did attempt to coerce" the licensee to employ more persons than were needed "by placing and causing to be placed a person as a picket in front of the place of business of said licensee." In the absence of an allegation to the contrary it must be assumed that the picketing was peaceful. But since the information so alleges, it also must be taken as true that the picketing was an attempt to coerce the licensee.

This Court has held that since picketing is a method of communicating ideas, States may not enact sweeping prohibitions of all picketing (*Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106) or of all picketing where there is no dispute between an employer and his employees (*A. F. of L.* v. *Swing*, 312 U. S. 321; *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293). But the Lea Act is not directed at picketing but at coercion. It does not prohibit picketing as such at all, but only all coercive means of forcing radio licensees to accept certain types of demands. Picketing may violate the Act only if and to the extent that it is coercive—and to the extent that it is coercive, like other forms of coercive speech it is not protected by the First Amendment.

In addition, coercion through picketing is prohibited by the Lea Act only when undertaken for purposes which Congress has characterized as unlawful. Picketing for an unlawful purpose may be forbidden, when there is plainly a clear and present danger that it may bring about substantive evils which Congress has a right to prevent.

A. COERCIVE PICKETING IS NOT PROTECTED BY THE FIRST AMENDMENT

This Court has held in the cases cited immediately above that peaceful picketing—the carrying of a placard containing written statements—is a form of speech or writing within the meaning of the First Amendment. But writings on such placards, or remarks by pickets, are entitled to no more constitutional protection than other forms of speech or writing. And it is well established that when words are used in order to coerce, the First Amendment does not protect them.

To take the simplest example, a man may be sent to jail for threats of violence, oral or written, although they consist of mere words. The principle is not limited, however, to threats of physical injury. That it includes economic injury as well is established by cases under the Sherman and National Labor Relations Act.

1. *The Sherman Act analogy*

Persons or organizations possessing monopoly economic power need not, and generally do not,

effectuate that power through physical violence. Oral or written threats or even suggestions will normally suffice to bring a recalcitrant member of the dominated industry into line. If a combination of sellers wrote, or told, a purchaser depending upon them for supplies that he would be deprived of goods if he did not raise his prices, or if a similar combination threatened to boycott anyone who sold to a price-cutting competitor, the Sherman Act would unquestionably be violated[*]—and nonetheless so because the economic pressure was exerted through written or spoken words. The same would be true if the combination of competitors arranged for a person to walk in front of another's business premises, carrying a sign saying "Unfair to Organized Business," with the intent and knowledge that this would prevent deliveries from being made. In all these situations a demand coupled with power to cause harm to the recipient is coercive and unlawful, and is not treated merely as speech.

[*] An "Official Report" issued by an association of retailers listing the names of those wholesalers who sold directly to consumers, and intended to persuade the retailers receiving the report to withhold patronage from the wholesalers listed, violates the Sherman Act. *Eastern Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600. The fact that the blacklisting was in writing, or contained in a publication, or even that it did not contain any threats on its face, did not entitle it to the protection of the First Amendment. See also *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418, quoted *infra*, pp. 72–73; *United States* v. *General Motors Corp.*, 121 F. 2d 376, 394 (C. C. A. 7), certiorari denied, 314 U. S. 618; *Lawlor* v. *Loewe*, 208 U. S. 274; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 303.

The *Allen-Bradley* case discussed at length, *supra*, pp. 36–39, shows that peaceful picketing to coerce non-cooperators by economic pressure may be enjoined under the Sherman Act.

While the speech and writings of business men and of labor leaders are equally protected by the First Amendment (*Thomas* v. *Collins*, 323 U. S. 516, 538, quoted *infra*, pp. 75–76), it is thus established that as to neither does this protection extend to words used to force compliance with monopolistic demands. Clearly the statements on a picket's sign are entitled to no more constitutional protection than words or speech generally.

In an early decision involving restraint of trade the Court expressly rejected the argument that a labor organization was protected by the First Amendment in announcing an illegal boycott by publication in its periodical, a publication seemingly entitled to no less protection than pickets' signs. With respect to that problem this Court unanimously declared, in terms equally applicable here (*Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418) (p. 437):

> "But whatever the requirement of the particular jurisdiction, as to the conditions on which the injunction against a boycott may issue; when these facts exist, the strong current of authority is that the publication and use of letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued,

and their use for such purpose may amount to a violation of the order of injunction. * * *

(p. 438):

* * * But if the contention be sound that no court under any circumstances can enjoin a boycott if spoken words or printed matter were used as one of the instrumentalities by which it was made effective, then it could not do so, even if interstate commerce was restrained by means of a blacklist, boycott or printed device to accomplish its purpose. * * *

(pp. 438–439):

* * * the principle announced by the court * * * covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter.

The court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained. To hold that the restraint of trade under the Sherman anti-trust act, or on general principles of law, could be enjoined, but that the means through which the restraint was accomplished could not be enjoined would be to render the law impotent.

2. *The National Labor Relations Act analogy*

Many cases under the National Labor Relations Act also hold that pressure exerted by means of words may be enjoined. An employer may be compelled to cease and desist from telling his employees, orally or in writing, that he will fire or otherwise discriminate against them if they join a labor union.[29] He may not tell them that he will close his plant if the employees become unionized.[30] As the Circuit Court of Appeals for the Sixth Circuit declared in *National Labor Relations Board* v. *Peterson*, 157 F. 2d 514, 515 certiorari denied, March 17, 1947:

> But in the decisions upon this point, the right of freedom of speech of the employer, in making statements disparaging of the Union, has always been held to be justified only if the expressions in controversy are

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[29] E. g., *National Labor Relations Board* v. *Peterson*, 157 F. 2d 514, 515 (C. C. A. 6), certiorari denied, March 17, 1947; *R. R. Donnelley & Sons Company* v. *National Labor Relations Board*, 156 F. 2d 416 (C. C. A. 7), certiorari denied, January 20, 1947; *National Labor Relations Board* v. *Aluminum Goods Manufacturing Co.*, 125 F. 2d 353, 355 (C. C. A. 7); *Glatfelter Co.* v. *National Labor Relations Board*, 141 F. 2d 631 (C. C. A. 3); *Consolidated Aircraft Corp.* v. *National Labor Relations Board*, 141 F. 2d 785, 788 (C. C. A. 9); *National Labor Relations Board* v. *American Laundry Machine Co.*, 152 F. 2d 400, 401 (C. C. A. 2).

[30] E. g., *National Labor Relations Board* v. *American Pearl Button Co.*, 149 F. 2d 311, 314–315 (C. C. A. 8); *National Labor Relations Board* v. *Franks Bros. Co.*, 137 F. 2d 989, 992 (C. C. A. 1), affirmed (without consideration of this point), 321 U. S. 702

> noncoercive. If they are couched in such phrases, or attended by such circumstances that they tend to exercise undue influence and coercion upon the employees, the expressions of opinion are not protected.

And even statements by an employer which on their face are not coercive may be forbidden when it appears that, in connection with other circumstances, they amount to coercion. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477–479; *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 539; *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 386. In the first *Virginia Electric* case the Supreme Court stated (314 U. S., at 477):

> * * * conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act. * * * And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. * * *

More recently, in *Thomas* v. *Collins*, 323 U. S. 516, 537–538, the Court declared that while employers had the right to persuade with respect to joining or not joining unions within the First Amendment's guaranty:

> * * * When to this persuasion other things are added which bring about coer-

> cion, or give it that character, the limit of the right has been passed. * * * Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection.

And Mr. Justice Douglas stated in a concurring opinion (323 U. S. at 543–544):

> * * * No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee. * * *

Congress may therefore provide, as it has in the National Labor Relations Act, that it is unlawful for an employer to *say* to an employee that he will keep any employee who joins a union from working in his or any other plant; it would be equally unlawful for the employer to say anything designed to give the employee that impression, whatever the form of words used. Such an oral statement, when considered in the light of the employer's superior economic power, is coercion, plain and simple, not the communication of information.

Equally coercive would be a statement by a labor leader who controls a union having a monopoly of employment opportunities in an entire

industry that he will prevent an employer from doing business, or an employee who works for a particular employer from ever getting a job in the industry again. In each instance, as in the case of the robber who states orally that he will shoot if the victim refuses to hand over his money, an oral statement accompanied by a power which gives it a coercive effect is more than mere speech, and the First Amendment does not protect it.

The Government has alleged that picketing here is coercive. It is entitled to prove the "other circumstances" which give it that character—in which may be included the appellee's dominance in the industry and his authority over the musicians; the known consequences to them of disobedience to his orders, and the association of picketing with striking; the effect of the pickets' placard as a signal not to work rather than as a statement of information.

These factors are the equivalent of the circumstances with respect to employer pressure under the Labor Relations Act which transform remarks not coercive on their face into coercive statements which may be forbidden without violating the First Amendment.

3. *Restraints by labor monopolies cannot be effectively regulated if coercive but peaceful picketing is immune from legislative control*

Furthermore, it is obvious that restraints by labor monopolies cannot be regulated or forbidden

if peaceful strikes and picketing are immune from legislative control. If a labor organization does not have monopoly power, its orders to strike or to refrain from working, or its picket line, may not be respected, and it may be forced to resort to violence in order to support its demands upon a particular employer. But such crudity is unnecessary when the union has a monopoly, as well as a membership disciplined in obeying union orders and familiar with the dire consequences that will follow upon disobedience. A union leader then need only issue an oral or written order. It might even suffice for him merely to announce that a "contract" is no longer in effect. Cf. *United States* v. *United Mine Workers*, decided March 6, 1947. If the men are trained to refrain from working when such a verbal signal is given, the effect would be the same as if it were a mandatory order. In *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418, 439, this Court stated in this connection:

> In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words "Unfair," "We don't patronize," or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called "verbal acts," and as much subject to injunction as the use of any other

> force whereby property is unlawfully damaged. * * *

And the placement of a single sign outside an employer's premises stating that he is "unfair" will be such a signal; members will know that the consequences of disobedience to such a command, whether expressed in informational or mandatory terms, will be expulsion from the union and inability to obtain work in the future.

Since it is common knowledge that these are the tactics of strong unions, Congress must have been aware that no law designed to regulate the conduct of so tightly controlled and well disciplined an organization as the Federation of Musicians could be successful unless it reached the peaceful but notoriously effective means by which such a union in fact achieves obedience to its commands. We think that the Court will also take notice of the obvious, that unless peaceful instructions not to work, whether set forth on pickets' placards or elsewhere, are within the reach of governmental authority, the Government will be helpless to control or regulate the conduct of monopolistic unions even though such regulation is substantively within its constitutional powers.

We submit that the First Amendment was not intended and has not been construed to free coercive conduct from lawful regulation because a person has such power over others that he may effect his coercion by means of peaceful words.

The information here charges that the picketing was coercive. This allegation, which must be taken as true on this appeal, establishes in itself that the First Amendment does not aid appellee.

4. *This Court's recent decisions on picketing do not invalidate statutes which prohibit only coercion and reach picketing only to the extent that it is coercive*

This Court's decisions assimilating picketing to speech are not at all inconsistent with our view that to the extent that picketing is coercive it is not constitutionally protected. The first two of the five cases in which the Court has held picketing protected by the First Amendment (*Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106), as subsequently summarized in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 297, "involved statutes baldly forbidding all picketing near an employer's place of business." In the three other cases (*A. F. of L.* v. *Swing*, 312 U. S. 321; *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293), the question was whether a State could prohibit all picketing "in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him" (*A. F. of L.* v. *Swing*, 312 U. S., at 325), or all picketing where there was no "labor dispute" within the meaning of a State anti-injunction act (*Wohl* and *Angelos* cases).

These decisions held only that blanket prohibitions of picketing, which did not differentiate between persuasion and coercion or between the lawful and the unlawful purpose, violated the First Amendment. The reasoning of the Court, as appears from the leading *Thornhill* case, is that the "dissemination of information" (310 U. S., at 102) and "free discussion concerning the conditions in industry and the causes of labor disputes" (*id.*, at 103), are to be protected by the First Amendment. The emphasis on "discussion" and "information" shows what the Court had in mind and refutes any suggestion that coercive picketing was to be protected.

That this is so appears clearly from the *Meadowmoor* case, in which the Court upheld the right of Illinois to prohibit even peaceful picketing when violence had given the picketing coercive effect (312 U. S., at 298). The dissent of Mr. Justice Reed in that case is also consistent with the view that coercive picketing is not constitutionally protected, since he states that "industrial controversy may not overstep the bounds of an appeal to reason and sympathy." (312 U. S., at 319.)

In the *Wohl* case the Court stated that (315 U. S., at 775):

> * * * A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual.

The opinion in that case notes that there was no showing that the publication there "was attended or likely to be attended by violence, force or coercion; *or conduct otherwise unlawful or oppressive*" (315 U. S., at 775). The italicized phrase clearly implies that threats of other types of pressure, in addition to threats of physical violence, are not given constitutional protection by the First Amendment. The important factor is whether the pressure upon the employer results from the disclosure of information to, or an appeal to the reasoning of, persons who see the pickets, or from the fact that they dare not disregard what in substance is a mandatory order. This appears to be recognized in the concurring opinion of Mr. Justice Douglas in the *Wohl* case, wherein he stated (315 U. S., at 776–777):

> Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.

The decision in *Carpenters Union* v. *Ritter's Cafe*, 315 U. S. 722, which permitted a State to restrain picketing not limited to the area of the industry concerned, also demonstrates that picketing is not regarded merely as discussion, persua-

sion and the dissemination of information. For if it were, whether the communication was made in one area rather than another would seem immaterial. The Court there refused to accept the petitioner's "claim that there is to be found in the Due Process Clause of the Fourteenth Amendment a constitutional command that peaceful picketing must be wholly immune from regulation by the community in order to protect the general interest, that the states must be powerless to confine the use of this industrial weapon within reasonable bounds." 315 U. S., at 725.

None of the recent cases have even suggested the invalidity of statutes which prohibit not picketing generally but coercion, and which reach picketing only when, and to the extent that, it is coercive. Since the Lea Act applies only to coercion its application to such picketing does not violate the First Amendment.

B. PICKETING FOR AN UNLAWFUL PURPOSE IS NOT PROTECTED BY THE FIRST AMENDMENT

We have shown (*supra*, pp. 40-46) that Congress has the power to make it unlawful in specified circumstances for a person to order other persons not to work. Such instructions would, as a matter of course, be given orally or in writing. Congress' power must be just as great if the instructions are given through the device of a man carrying a placard in front of the licensee's premises as by written or oral notices given elsewhere.

We have also shown (*supra*, pp. 47–62) that Congress has the power under the Constitution to prohibit strikes for specified unlawful purposes. What has been said as to strikes is equally true as to picketing. It is well established at common law that if a strike is unlawful because of its purpose, picketing for the same objective is also unlawful.[1] If that were not so, a declaration as to the illegality of a strike would be useless, since the union could accomplish the unlawful objective by picketing. This rule has not been changed by the recent decisions of this Court. The *Allen-Bradley* case, 325 U. S. 797, as we have noted (*supra*, pp. 36–38), upheld an injunction against picketing as well as striking when the object of the union was in violation of the Sherman Act. This case, which is the latest of those dealing with picketing, is the only one of the recent decisions in which any unlawful purpose was shown, and accordingly is controlling on that aspect of the picketing problem.

In none of the picketing cases discussed *supra*, pp. 80–82, is there an explicit reference to the lawfulness of the objective. But the *Thornhill* opinion declares that (310 U. S., at 103–104):

> It is true that the rights of employers and employees to conduct their economic

[1] I. Teller, *Labor Disputes and Collective Bargaining*, Sections 113–114.

> affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. See Mr. Justice Brandeis in 254 U. S., at 488. * * *

This passage was reemphasized by the Court in *Carpenters Union* v. *Ritter's Cafe*, 315 U. S. 722. It clearly suggests that the efforts of legislative bodies affirmatively to limit the area of "permissible contest open to industrial combatants" will be respected—and any such legislative limitation would be futile if striking or picketing in disregard of it could not be touched.

That the Court regarded striking and picketing as subject to similar restrictions is apparent from the citations supporting the above passage in the *Thornhill* opinion, in which Mr. Justice Murphy refers to Mr. Justice Brandeis' statement in the *Duplex* case, quoted *supra*, pp. 49–50, as well as to *Dorchy* v. *Kansas*, discussed *supra*, pp. 47–49. These citations in the picketing cases of opinions recognizing the legislative power to prohibit strikes for unlawful purposes would be meaningless unless the Court meant that picketing could constitutionally be controlled in the same way. Clearly for Congress to have power under the Constitution to prescribe the ends for which strik-

ing would be unlawful would be futile if labor organizations could accomplish the same lawful purpose by means of picketing—which would be equally effective in many industries in keeping persons from working.

The fact that picketing may be a form of speech, or of writing, does not impair the validity of these conclusions. Any order issued by a labor leader directing union members not to work for an employer would take the form of an oral or written communication. The fact that it may be carried up and down the sidewalk in front of the employers' place of business on a cardboard placard gives it no greater sanctity than any other statement. And if union members will read any placard borne by the picket as a direction not to work for the employer, the wording of the placard is immaterial. The placard merely is a "signal" that the command not to work is in effect. See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 436–439, quoted *supra*, p. 78.

A number of state supreme courts have construed the recent decisions of this Court as not protecting picketing for unlawful purposes. *Lafayette Dramatic Productions* v. *Ferentz*, 305 Mich. 193, 9 N. W. 2d 57 (1943); *Harper* v. *Brennan*, 311 Mich. 489, 18 N. W. 2d 905 (1945); *Wisconsin Employment Relations Board* v. *Milk Drivers Union*, 238 Wis. 379, 9 N. W. 2d 57

(1941), certiorari denied, 316 U. S. 668; *Retail Clerks' Union* v. *Wisconsin Employment Relations Board*, 242 Wis. 21, 6 N. W. 2d 698 (1942); *R. H. White Co.* v. *Murphy*, 310 Mass. 510, 38 N. E. 2d 685 (1942); *Markham & Callow* v. *International Woodworkers*, 170 Ore. 517, 135 P. 2d 727 (1943); *Peters* v. *Central Labor Council*, 169 P. 2d 870, 874 (Ore. 1946). In the *Lafayette* case, decided in 1943, and involving the precise situation at which the Lea Act was directed, the right of the musicians' union to force the hiring of unnecessary musicians, the Michigan Supreme Court said (305 Mich. at 213–214):

> In the present case defendants' objective was to compel plaintiff to employ musicians which it did not need or desire. Such objective invaded plaintiff's right to conduct its business without unjust interference and its right to the free flow of labor. * * * We are satisfied that defendants' purpose was to accomplish an unlawful labor objective.
>
> In effect, defendants argue that the stagehands' union and the musicians' union had the right to strike and to do peaceful picketing. We do not deny them that right in the accomplishment of a legitimate labor objective. However, we do deny them the right to combine for the purpose of using such lawful methods to obtain an unlawful labor objective. *Opera on Tour, Inc.* v. *Weber, supra.*

In the most recent *Peters* decision, the Oregon Supreme Court stated with respect to this Court's decision (169 P. 2d, at 874):

> * * * It is significant that in those cases where the Supreme Court identified picketing with free speech no unlawful purpose of the picketing was involved. That courts may take into consideration the purpose of the picketing is established by the great weight of authority. * * * *

The point was carefully considered by Professor Dodd in an article[32] which defends and supports this Court's decisions on picketing. In this connection he states (56 Harv. L. Rev. 524):

> * * * Picketing is, however, more than the statement of a case. When made use of by strikers, it is an express or implied invitation to the public to aid the strikers by refraining from dealing with their employer. If the concerted action of the strikers is unlawful by reason of its

[32] Dodd, *Picketing and Free Speech: A Dissent*, 56 Harv. L. Rev. 513 (1943). Other discussions of this Court's decision on picketing may be found in Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180 (1942), (reprinted with supplementary discussion in 1946 Cum. Supp. to Teller, *Labor Disputes and Collective Bargaining*, pp. 59–88); Teller, *Picketing and Free Speech: A Reply*, 56 Harv. L. Rev. 532 (1943); Jaffe, *In Defense of the Supreme Court's Picketing Doctrine*, 41 Mich. L. Rev. 1037 (1943); Larson, *May Peaceful Picketing Be Enjoined?*, 22 Tex. L. Rev. 392 (1944); Ratner and Conne, *The Norris-LaGuardia Act In The Constitution*, 11 Geo. Wash. L. Rev. 428 (1943); Schlusselberg, *The Free Speech Safeguard for Labor Picketing*, 34 Ky. Law Journal 3 (1945).

> purpose, it would be difficult to uphold the contention that they have a constitutional right to attempt to urge others to assist them in accomplishing that purpose. Soliciting others to give aid to an unlawful course of conduct is not constitutionally protected free speech, at least where there is a "clear and present danger" that the solicitation will be successful and thus bring about the "substantive evils which Congress [or a state legislature or court] has a right to prevent." [Citing *Schenck* v. *United States*]

Appellee argues, however, that the picketing here is not for an unlawful purpose, inasmuch as the licensee may voluntarily do what the union is forbidden to coerce it to do. This is the same point made with respect to striking, already discussed herein at page 53–67, *supra*. Our answer is the same, and based on the same authorities, which involved both striking and picketing. They show that picketing as well as striking may be for an unlawful purpose within the meaning of that expression in the field of labor law, if an objective is one that cannot lawfully be forced upon an employer even though he could lawfully voluntarily assent to it. Without repeating our argument, it would seem sufficient to point out that the *Allen-Bradley* case held that peaceful picketing for an unlawful purpose may be enjoined even though the party picketing might voluntarily have agreed to the union's demands.

The clear and present danger test.—Appellee also argues that the right of freedom of speech cannot be circumscribed "by the device of declaring certain objectives to be unlawful", that "the only proper limitation on the right of free speech is * * * the 'clear and present danger' test," and that "there is no 'substantive evil'" to which the "clear and present danger test" can be applied (reply brief below, pp. 29-30).

It is to be noted that appellee does not deny that if compelling radio licensees to hire unnecessary employees is a substantive evil, as Congress reasonably found it was, picketing is a practice which would directly and immediately—or clearly and presently—produce the evil Congress was seeking to prevent. Appellee cannot deny the known effectiveness of his picket line in preventing musicians from working. Picketing which is designed to accomplish and which, unless restrained by law, will accomplish, something which Congress has made unlawful will bring about "a clear and present danger" of "the substantive evils that Congress has a right to prevent." *Schenck* v. *United States*, 249 U. S. 47, 52 (per Holmes, J.)

We can concede the applicability of the "clear and present danger test" as classically stated by Mr. Justice Holmes in the *Schenck* case.[33] But

[33] "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

the Lea Act does define evils which Congress may seek to prevent under the Commerce Clause (see pp. 16–34, *supra*), and, in Professor Dodd's words, "there is a 'clear and present danger' that the solicitation will be successful" in bringing about those evils—particularly in an industry dictatorially controlled by a single labor organization whose members will not bear to risk loss of a future livelihood by crossing a picket line.

This Court has observed that for the clear and present danger test to be satisfied there must be a "substantial" or "serious" evil threatened by the utterance, not a mere matter of "public inconvenience or annoyance." *Bridges* v. *California*, 314 U. S. 252, 261–263; *Thomas* v. *Collins*, 323 U. S. 516, 530, 536; *Pennekamp* v. *Florida*, 328 U. S. 331, 334. The Lea Act, which is directed at specified coercive restraints of interstate trade for purposes deemed akin to extortion does

(*Schenck* v. *United States*, 249 U. S. 47, 52). The *Schenck* case doctrine has been frequently reaffirmed by this Court. *Herndon* v. *Lowry*, 301 U. S. 242, 256; *Thornhill* v. *Alabama*, 310 U. S. 88, 105; *Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *Bridges* v. *California*, 314 U. S. 252, 261; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571; *Hartzel* v. *United States*, 322 U. S. 680, 687; *Thomas* v. *Collins*, 323 U. S. 516, 527; *Pennekamp* v. *Florida*, 328 U. S. 331, 335, 352–353. The test has also been mentioned in concurring and dissenting opinions in *Abrams* v. *United States*, 250 U. S. 616, 627; *Schaefer* v. *United States*, 251 U. S. 466, 482; *Pierce* v. *United States*, 252 U. S. 239, 255; *Gitlow* v. *New York*, 268 U. S. 652, 672–673; *Whitney* v. *California*, 274 U. S. 357, 373; *Bridges* v. *Wixon*, 326 U. S. 135, 164; *Marsh* v. *Alabama*, 326 U. S. 501, 512.

deal with substantial and serious evils. Its basic policy is similar to that of the antitrust laws, the importance of which cannot be questioned and which have been held applicable to picketing. See pp. 34–40, *supra*.

Since the Lea Act by its terms prohibits only coercion to attain the enumerated ends, it reaches only activities which are closely related to accomplishing the prohibited objective, as distinct from acts having a mere tendency to effect them. At the very least the Government should be permitted to prove its allegation that the picketing was coercive.

Furthermore, we are not arguing, as appellee implies, that Congress may prevent people from talking about certain subjects by declaring objectives to be unlawful. The Lea Act, like the Sherman Act and the National Labor Relations Act, is a regulatory statute aimed at substantive coercive practices, not at speech or writings or picketing as such. Speech or writing fall within its prohibitions only if they lead to the consequences which Congress had a right to seek to avert.

V

SECTION 506 DOES NOT VIOLATE THE FIFTH AMENDMENT BY DENYING THE EQUAL PROTECTION OF THE LAWS

Appellee argues that Section 506 violates the Due Process Clause of the Fifth Amendment by depriving him of the equal protection of the laws in that (a) it applies only to employees and not

to employers, (b) it applies only to the radio broadcasting industry, and (c) it reaches other employees of the broadcasting industry than musicians, although there was no evidence to show that any but musicians had been guilty of any excess (reply brief below, p. 33).[34] There is no substance to any of these contentions.

It may be noted preliminarily that, as this Court has frequently stated, "Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress. *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584–585; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 400, 401; *Helvering* v. *Lerner Stores Co.*, 314 U. S. 463, 468." *Detroit Bank* v. *United States*, 317 U. S. 329, 337–338; *Hirabayashi* v. *United States*, 320 U. S. 81, 100. Any legislative classification which is not so arbitrary as to deny due process of law will therefore be upheld, and the Court has stated, what the above cases clearly imply, that the Due Process Clause imposes "restraints less narrow and confining" than the Equal Protection Clause. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584.

In any event, it is clear that Section 506 does not contain a classification which would violate either the Equal Protection or the Due Process Clause.

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[34] The District Court accepted the first two of these contentions (R. 7–8).

A. *Discrimination in favor of employers*

The appellee's argument that Section 506 arbitrarily differentiates between the acts of employers and of employees rests on the fact that the Section does not prohibit licensees, for example, from hiring or agreeing to hire, more employees than they need but merely forbids anyone from forcing them to do so. This is similar to contending that because A may lawfully give B $10, it is unconstitutional to make it a crime for B to obtain the $10 from A by extortion or coercion.

If we assume that the voluntary employment by radio licensees of unnecessary personnel would also enhance costs and thereby burden the public's interest in the best possible interstate radio service, it does not follow that Congress was under any obligation to forbid it—especially since the Federal Communications Commission might have present authority to take such a matter into account in determining whether to grant or renew licenses. See pp. 31–32, *supra*. There has been no showing or even suggestion that the practice of hiring unnecessary employees has been prevalent in the industry apart from outside coercion, or that radio service has in fact been harmed by it. As we have seen, Congress could reasonably assume that the employers' normal self-interest would coincide with the public's interest in this respect, and would be sufficient in and of itself to prevent this type of practice in the absence

of coercion. On the other hand, there was ample evidence before Congress that the American Federation of Musicians was subjecting the industry and the public to the burden in question.

This Court has frequently held that "Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent" (*Hirabayashi* v. *United States*, 320 U. S. 81, 100; *Keeley Coke Co.* v. *Taylor*, 234 U. S. 224, 227), and that a legislature (*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160–161):

> * * * may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 81. *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205.
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> * * * If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411. * * *

Appellee's contention that Section 506 violates due process of law because it does not apply to the employers is strikingly similar to the converse argument advanced when employers were at-

tacking the National Labor Relations Act. The Court's reply to this argument in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46, is equally apt here. The Court there stated:

> The Act has been criticised as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible; that it fails to provide a more comprehensive plan,—with better assurances of fairness to both sides and with increased chances of success in bringing about, if not compelling equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Miller* v. *Wilson*, 236 U. S. 373, 384; *Sproles* v. *Binford*, 286 U. S. 374, 396. * * *

A similar argument was recently rejected by the Court in *Alabama State Federation of Labor*

v. *McAdory*, 325 U. S. 450, 471–472. The Court there stated:

> The contention that the Act denies equal protection because its provisions, or some of them, have not been extended to business corporations or associations or to labor organizations which are subject to the Railway Labor Act, 45 U. S. C. § 151 *et seq.*, is without substance. The Constitution does not oblige a state to regulate or reform all types of associations and organizations, or none. It may begin with such as in its judgment most need regulation. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Bunting* v. *Oregon*, 243 U. S. 426; *Sproles* v. *Binford*, 286 U. S. 374, 396; cf. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 400, and cases cited. And for this reason it may exclude from regulatory measures organizations which it has reason to believe are already appropriately regulated by either state or national legislation. *Ziffrin, Inc.*, v. *Reeves*, 308 U. S. 132, 140; cf. *Union Bank & Trust Co.* v. *Phelps*, 288 U. S. 181, 186.

The last sentence in the passage quoted is especially pertinent in view of the subjection of licensees to detailed regulation by the Federal Communications Commission.

B. *Discrimination in favor of other industries*

It certainly cannot be doubted that Congress may validly pass laws regulating one industry

and not another without violating the Due Process Clause. The Federal Communications Act itself, apart from Section 506, is an example of that. Citations are hardly necessary to support so familiar a proposition. Both federal and state statute books are filled with laws which deal with particular industries. In upholding the power of a State to differentiate between different types of insurance companies, this Court said (*Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411):

> * * * Again, if an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation. *Otis* v. *Parker*, 187 U. S. 606, 610, 611. * * *

See also *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580.[35]

[35] In the *Brownell* case the Court set forth more generally the test to be applied under the Equal Protection Clause as follows (294 U. S., at 584):

"It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made

It is clear that Congress had good reason for believing the coercive enforcement of the harmful practices referred to in Section 506 to be especially serious in the broadcasting industry. Although other unions may have so-called featherbedding restrictions, it does not appear that in any similar industry (if there be one) a union is in a position, because of a nation-wide closed shop and a president with completely unfettered powers, to coerce employers to the same extent. Indeed appellee himself has admitted to a congressional committee that his control of the musicians made his position "unique." See p. 17, *supra*.

Nor does it appear that in any other industry a union is seeking to impose restrictions so contrary to the public interest in a non-wasteful use of limited facilities of interstate commerce. Appellee refers only to the motion picture and chain hotel businesses on which the Musicians' Federation itself may be imposing similar burdens. But Congress may have thought that restrictions on those industries are much less harmful to interstate commerce and to the public welfare than in

known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Tax Commissioners* v. *Jackson*, 283 U. S. 527, 537."

the broadcasting industry, and such a conclusion could not be regarded as arbitrary. It does not appear that Congress was informed that those industries were subjected to coercive monopoly power to the same extent as the broadcasting industry. And in neither of those industries is service to the public limited by the physical factors which have necessitated federal control of radio broadcasting. See *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 213.

C. *The Act is not discriminatory either because it only reaches musicians or because it applies to other types of radio employees as well*

In the court below we thought that appellee was arguing that the Act was invalid because Congress was induced to enact it because of the activities of a single labor organization. Inasmuch as the Act applies to any one who interferes with broadcasting in the ways specified it clearly does not fall in the class of special legislation applicable only to a single person or organization. Cf. *United States* v. *Lovett*, 328 U. S. 303. Its coverage extends beyond musicians (who are not mentioned) to practices by anyone (including other employees) affecting radio licensees.

If a monopoly in restraint of trade existed in only a single industry, Congress could legislate with respect to that industry, and none the less so because it knew that the evils prompting the

legislation had been the work of an identified individual or company to whom the legislation would primarily apply. It would not be bound either to regulate monopoly in other industries where it did not exist or to neglect the single industry in which the public was being damaged. As long as the legislation applies generally to whoever commits a specified offense, there can be no question as to its validity in this respect.

Here Congress was informed that the Federation of Musicians was coercing the broadcasting industry into accepting demands which Congress thought contrary to the public interest. The fact that Congress had this in mind when it passed the law can hardly be of legal consequence. If that were not so the perpetrator of any harmful practice could escape future governmental control if his personal conduct so shocked the legislators as to become responsibe for the enactment of remedial legislation.

In his reply brief below (pp. 32–33) appellee stated that the Government had misunderstood his position on this point. His "actual argument" was that the Act contained an unconstitutional classification because it applied to all broadcasting employees and not merely to the musicians, when the evidence before Congress has shown only the musicians "guilty of any excesses." In other words, the appellee is arguing that the Act may not constitutionally be applied

to the Federation of Musicians, which Congress knew [illegible] engaged in the types of conduct forbidden, because it would also reach other radio employees if they did the same thing.

This argument, we believe, falls from the mere statement. Unquestionably if the Act had in terms applied only to musicians, appellee would be arguing that it was unconstitutional as special discriminatory legislation. Since Congress was wise enough to make the Act sufficiently broad to cover all persons who engaged in the same type of coercion of radio licensees, appellee argues that the Act is void because it is not limited to musicians. If laws violated the Due Process or Equal Protection clauses both because they were and because they were not limited to the precise persons responsible for the evil which Congress was seeking to eliminate, few statutes would be valid. Congress clearly had the right and power to deal with the broadcasting industry as a whole for this purpose.

VI

SECTION 506 (a) (1) IS NOT INVALID FOR INDEFINITENESS

It is clear enough, at least at this time, that a statute may be unconstitutional because it speaks in language too indefinite to be understood.[36] It

[36] It was not so clear a generation ago. In *United States v. Brewer*, 139 U. S. 278, 288 (1891), the Court was content with the simpler proposition that if an act was too vague for a man to know whether or not he violated its prohibition,

cannot exact "obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 243. A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U. S. 385, 391.

None would quarrel with these general precepts. On the other hand, it is far from easy to give them definite content or specific application.[37] Their inherent vagueness has not been removed by any crystallized or precisely articulated course of decision in applying these criteria. Since the question is one of due process of law, the ultimate in-

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then he was not within its terms. And in *Lloyd* v. *Dollison,* 194 U. S. 445, 450 (1904), Mr. Justice McKenna, writing for a unanimous Court, indicated a real doubt that the due process clause carried any prohibition against indefiniteness: "If a case can exist in which the kind or degree of power given by a State to its tribunals may become an element of due process under the Fourteenth Amendment, it would have to be a more extreme example than the Ohio statute. * * * Besides, would it not be strange to hold that a statute unaccompanied by a glossary of its terms leaves unfulfilled the legislative power?" Apparently the first explicit recognition by this Court of a constitutional limitation was in *Waters-Pierce Oil Co.* v. *Texas (No. 1),* 212 U. S. 86, 108–111 (1909). Not until *International Harvester Co.* v. *Kentucky,* 234 U. S. 216 (1914), did the Court hold a statute invalid on this ground.

[37] Cf. Note, *Indefinite Criteria of Definiteness in Statutes,* 45 Harv. Law Rev. 160.

quiry is whether the statute offends seriously accepted notions of fair play.

We submit that the provision of the Lea Act making it unlawful for anyone "willfully" to coerce radio licensees "to employ or agree to employ * * * persons in excess of the number of employees needed by such licensee to perform actual services" is sufficiently definite. Certainly it can not be said that such language establishes a standard so vague as to be really no rule or standard at all. Nor, in view of the requirement of willfulness, could this provision punish anyone for conduct which he could not know to be a violation of law.

As we shall show, the district court's holding that this provision is too indefinite is based upon a misconstruction of the statute. In view of this, it is necessary to consider the meaning of Section 506 (a) (1) before endeavoring to determine whether it provides too vague a standard. We submit that if the statutory language is given its ordinary meaning in accordance with its context, its purpose and its legislative history, there can be no problem as to its definiteness.

A. *The meaning of Section 506 (a) (1)*

The evil at which paragraph (a) (1) of the Act was directed appears from the illustrations given in the course of the legislative history of the Act, many of which have already been mentioned (pp.

27–34, *supra*). In the House Committee Report (No. 1508, 79th Cong., 2d sess., p. 5, *infra*, p. 165) and on the floor of Congress (92 Cong. Rec. 1549, 3245) reference was made to appellee's demand that twice as many musicians be employed if the same music was to be broadcast at the same time over standard and frequency modulation outlets. Both in the Committee Report (p. 3, *infra*, p. 161) and on the floor (92 Cong. Rec. 1549–1550, 3250) reference was also made to demands that the large number of "small broadcast stations in the country having no live orchestras would be compelled to employ such orchestras." There was also repeated reference to the demand that "voluntary noncompensated orchestras be barred from broadcasts unless an orchestra of the Federation of Musicians were also employed" or the Union paid an equivalent or greater amount. Report, pp. 3, 5 (*infra*, pp. 161, 165); 92 Cong. Rec. 1543–1544, 1545, 1548, 1550, 1557, 3242.

At the hearings before the House Committee it was brought out that the Federation of Musicians forced the radio stations to agree to expend a fixed percentage of their gross income for staff musicians. 1945 Hearings, p. 69.[35] Network boycotts were threatened to enforce these demands on stations which would not increase their quotas.

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[35] Staff musicians would not include musicians paid by advertisers or advertising agencies. See p. 33, note 17, *supra*.

Id., at 70. The testimony was that the Union sought to justify these quota demands as a means of preventing unemployment, that "there has never been any attempt to gloss over the fact that the imposition of these quotas is a pure 'make-work' project, having no relation to safety, health, working conditions or any incident of employment. It is obvious that these forced quotas are of no benefit to the station or to the public." *Id.*, at 71. Another broadcaster in a statement quoted *supra*, p. 28, declared that the Union representatives had admitted that the station did not need any of the additional musicians demanded. The Committee's attention was also called to the appellee's demands that stations employ musicians exclusively to do nothing but play phonograph records, work which could be and had been done by other employees along with other duties. See pp. 29–31, *supra*.

These examples illustrate the practices against which Paragraph (a) (1) of the Act was directed. They all have in common a complete lack of relation between the demands and the working conditions of the persons actually employed by the licensee, and an avowed and open disregard for whether the persons required to be employed were needed by the employer. Indeed, in every example given it is obvious that they were not.

The illustrations also make clear what the Act

was not intended to reach—*bona fide* disputes as to conditions of employment, including such matters as hours of work and whether additional workers might be required to prevent employees from working too hard. At no time did anyone suggest that the Act dealt with such matters. On the contrary, it affirmatively appears that the Act was not intended to reach such situations.

The House Committee Report (p. 6, *infra*, p. 167) declares in a passage quoted several times on the floor of Congress (92 Cong. Rec. 1550, 1559, 3241, 3248) that subsection (a) "will place no limitation whatever on the use of strikes for the accomplishment of legitimate objectives, such as wage increases or *better working conditions*". [Italics supplied.] Representative Lea, when asked about a broadcaster who wanted only six employees when he actually needed eight, stated "if a union wanted to strike because of working conditions or a hardship that comes to a particular member, it has a right to strike on that ground" (92 Cong. Rec. 1549). Again, Senator Austin of the Conference Committee stated to the Senate that "there may be a strike for a new contract with reference to wages, with reference to *hours*, or with reference to anything else except those things which are denounced because they have been proven through experience as being a type of tyranny which

others should not suffer". *Id.*, at 3248. [Italics supplied.] Senator Tunnell, also of the Conference Committee, subsequently stated that "I do not believe that the bill reaches those on whose behalf Senators are solicitous. I do not believe that any injustice will be done. I know that such is not the intention. There is no intention to reach the innocent." *Id.*, at 3251. Senator White of the Conference Committee stated, in answer to Senator O'Mahoney's inquiry as the right of three artists who thought the burden of work on them was too heavy and that five persons were needed to carry on the program (92 Cong. Rec. 3257):

> I think the first obligation of everyone concerned would be to negotiate and see if they could, by discussion and by concession, reach an agreement. If they could not and they arrived at an impasse, I think the employees could strike if they wished to do so. If they walked out, I think they would be doing something legal.

The Committee Report (pp. 1, 2, 3, 4, 5, *infra*, pp. 158–166) and the debates (92 Cong. Rec. 1549, 1550, 1556, 2822, 3242) repeatedly refer to the "extortionate" nature of the demands at which the bill was directed. The Report (p. 4, *infra*, pp. 162–163) states in this connection:

> The perpetration of the offenses penalized by this bill involve moral turpitude akin to that of larceny, embezzlement, the

> acquisition of another's property by false pretenses, racketeering, and extortion. They are not within the legitimate activities of any organized association of individuals for the cooperative purpose of their accomplishment.

Such language plainly shows that the bill was not intended to apply to mere differences of opinion as to whether men were overworked; it only fits deliberate demands for payment to additional employees made in complete disregard for the employer's need and without any justification from the viewpoint of actually getting the employer's business done. As we have seen that was the only kind of case the sponsors of the Act had in mind.

Additional proof of this is found in the Act itself. Paragraph (1) of subsection (a) is only one of a series of paragraphs aimed at the same sort of featherbedding demands. Paragraph (2) prohibits coercion of a licensee to pay "in lieu of giving, or on account of failure to give employment" to persons in excess of the number needed for actual services. Paragraph (3) relates to paying more than once for the same services. Paragraph (4) deals with paying for services not to be performed. Paragraphs (2), (3) and (4) thus are concerned with demands either for payment for work not done, or for paying more than once for work only performed

once. Paragraph (1) clearly deals with the same kind of demand, a slightly different method of collecting payment more than once for the same work. If Paragraph (1) is read in its context, along with the succeeding paragraphs, it is clear what Congress was driving at when it characterized the Act as one to prevent extortion, as distinct from *bona fide* demands relating to conditions of employment.

We think the construction we have suggested is the normal meaning which would be drawn from the words of paragraph (a) (1) "in excess of the number of employees needed by such licensee to perform actual services." But if there should be any doubt as to what the Act was meant to reach, it would be resolved by the provision in paragraph (d) punishing only those who violate the statute "willfully". Although this Court has said that "willful" may have different meanings, customarily in criminal statutes it requires a deliberate intention to do what the statute forbids, or what amounts to the same thing, "reckless disregard" (*Screws* v. *United States*, 325 U. S. 91, 103–104, 130) for what the law provides. As this Court has said in several cases, although sometimes willful "denotes an act which is intentional rather than accidental * * * when used in a criminal statute it generally means an act done with

a bad purpose". *Screws* v. *United States*, 325 U. S. 91, 101, and cases cited; *United States* v. *Murdock*, 290 U. S. 389, 394. "An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime." (*Screws* v. *United States*, at 101). The Court stated in *Hartzel* v. *United States*, 322 U. S. 680, 686, that the word "willful" must be taken to mean "deliberately and with a specific purpose to do the acts prescribed by Congress". In *United States* v. *Illinois Central R. Co.*, 303 U. S. 239, 243, "willfully" was said to describe the attitude of one "who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."

A "bad purpose" or evil motive does not mean that a defendant must himself believe his conduct to be evil, but merely that he intends deliberately to disregard what the law prohibits. It is, of course, immaterial that a defendant may disagree with the judgment of Congress as to whether conduct declared to be unlawful is bad or wrongful.[39] We believe that to violate the statute here involved a defendant must know that he is demanding the employment of persons not needed or act

[39] A belief on the part of a union official that it was desirable and good to put unemployed persons to work without regard for the employer's need would not negative the necessary scienter, if he intended to coerce the employer to hire persons whom he knew not to be needed.

in complete disregard of the licensee's needs.[*]

This is what we think "willfully" was clearly intended to mean in the statute here involved. Representative Lea stated in the House that the bill would only apply to a person who "actually participates in the willfull purpose". 92 Cong. Rec. 1562. And to make sure that his colleagues would know what he meant, he went on to state: "That is the general rule of criminal law", *Ibid.* Senator Johnson, who was in charge of the bill in the Senate, referred to the willfulness provision as "very important". *Id.*, at 3250. And Senator Austin, of the Conference Committee, calling specific attention to the requirement of willfulness in the penalty section of the Act, said that "it can be seen that the prosecutor

[*] It is immaterial, insofar as the question of definiteness is concerned, whether a defendant must know that his conduct is in violation of the statute or merely that the number of employees which he is forcing upon a licensee is more than are needed to perform actual services (the latter, of course, being included within the former). In either event there can be no ground for complaint that the phrase "number needed" is not sufficiently definite to apprise him of the nature of the conduct declared unlawful—and that is the only question of indefiniteness which has been raised. Normally if a defendant deliberately engages in illegal conduct, the need for *scienter* is satisfied whether or not he is familiar with the statute making what he is doing illegal. But inasmuch as the persons who would be likely to violate the Lea Act would probably not be ignorant of its provisions, the difference is not of great consequence insofar as this case is concerned. Appellee undoubtedly will not contend that he was not aware of the statute.

would be required, in such a prosecution, to show that there was such a violation as was willfully intended to cut across the policy of the law". *Id.*, at 3249.[41]

The repeated characterization of the crime described in the statute as extortion (the Committee Report also referred to larceny, embezzlement, and false pretenses) and immoral further confirms the view that only deliberate violations were prohibited. Only such conduct could arouse such legislative indignation. Each of the offenses Congress thought comparable clearly contains *scienter*, a deliberately wrongful intention, as an essential ingredient.

If it be thought that the purpose and history of the Act leave the meaning of "willfully" in doubt, and that the point is material to the question of constitutionality, the word should be given the construction which will most clearly sustain the Act's constitutionality, *i. e.*, the requirement

[41] Subsequently Senator Austin stated, first, that "the fact, in every case, depends on intent", and second, that the employees' "good faith" had nothing to do with the matter if in fact they were demanding the employment of more persons than are needed. 92 Cong. Rec. 3257. His remarks on this point do not seem entirely consistent. But the statement quoted in the text is the only one directed to defining the requirement of willfulness. Since it deals with the point specifically, and is consistent with the statement of Representative Lea, for whom the bill is named and who sponsored it in the House, and with many other indicia of legislative intention to which we have already made reference, we think that statement a more accurate reflection of the intention of Congress on the point.

of a deliberate violation. Courts will construe statutes so as to avoid constitutional doubts, to save rather than to destroy. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *The Abby Dodge*, 223 U. S. 166; *St. Louis, S. W. Ry.* v. *Arkansas*, 235 U. S. 350; *Crowell* v. *Benson*, 285 U. S. 22; *Wright* v. *Vinton Branch Bank*, 300 U. S. 440; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Screws* v. *United States*, 325 U. S. 91, 105.

B. *In holding that the Act was indefinite because it allowed the employer to determine the number of employees needed, the court below misconstrued the statute*

The decision below that paragraph (a) (1) was too indefinite was based on the assumption that the number of employees needed was "established by the licensee without prior knowledge upon the part of the person subjected to prosecution" (R. 5), and that a person's "guilt or innocence" should not be "subject wholly to the whim of others" (R. 5).

But that is not what this Act means. It does not allow the determination of the number of employees needed to be established subjectively by the licensee. The bill was amended to avoid that very difficulty. As originally reported to the House by the Committee on Interstate and Foreign Commerce, paragraph (a) (1) made it unlawful to coerce a radio licensee "to employ

* * * persons in excess of the number of employees *wanted* by such licensee.". (Italics supplied.) This provision was criticized on the ground that it would permit an employee to overburden his employees and prevent them from seeking to induce him to lighten their burdens by increasing the size of the working force (92 Cong. Rec. 1546). Subsequently, Representative Holifield, not a member of the Committee, offered an amendment, which would strike the words "wanted by such licensee", and substitute "needed by such licensee to perform actual services" (92 Cong. Rec. 1564). The amendment was immediately accepted by the Committee, and agreed to by the House without debate (*ibid*)—obviously because it more accurately expressed the thought which the Committee originally intended. The bill as modified was accepted by the Conference Committee. During the debate in the Senate on the Conference Report, Senator Johnson, in charge of the measure, stated flatly that it was not the radio station which determined the number needed. (92 Cong. Rec. 3245, 3256). He then went on to refer to the change in the language as follows (*id.*, at 3245):

> I think it should be said in connection with what the Senator from Vermont has already so well stated, that while the bill was being considered in the House the word

was changed from employee "wanted" to employees "needed." That is a very important change. But that change was made, and the conference report and the measure now contain the word employees that are "needed"; not employees that are wanted, but employees that are needed.

The change from "wanted" to "needed" shows that the employees or their representatives are not bound by the decision of the licensee as to how many persons he desires to employ, as long as their demands are related to the necessities of the licensee's business.

And it is important to note that in the provision as amended "number of employees needed" does not stand alone. It is modified and limited by the phrase "to perform actual services".

The Act assumes that the licensee-employer has the right to determine what services he wishes his business to render and his employees to perform. This is the normal prerogative of an employer. The services actually rendered by an employer, for which he requires employees, are usually known by those interested in working for him or are readily ascertainable by those familiar with the industry—and this Act would not be likely to affect anyone else. The number of employees needed to perform such actual services thus would not be a vague or elusive concept. The number would be determined by taking into account the custom of the industry and of industry and labor

generally as to working hours, the nature and difficulty of particular jobs, and common experience as to how many persons are necessary to perform them.

C. *Section 506 (a) (1) is sufficiently definite*

The Lea Act, we submit, is clearly constitutional in the light of these criteria. Despite the possibility of borderline cases (as to which see pp. 127–130, *infra*), there can be no question that in the type of case Congress intended the statute to reach a defendant would know that he was forcing upon an employer more employees than were needed. No one could claim in good faith, for example, that twice as many musicians were needed to broadcast simultaneously on standard wave lengths and on frequency modulation as on the former alone; all that is needed is two microphones and two transmitters. No one could claim in good faith that a station needed a number of musicians to act exclusively as platter turners, that is to put on and take off phonograph records, if announcers and other technicians can perform without hardship this simple operation in a few seconds per program along with their other duties. In these and other cases which Congress had in mind, the union has paid no attention to the employer's needs. It treated that as irrelevant, and was concerned entirely with what it regarded as its own interest in securing employment for its members. If a defendant makes that the criterion, irrespective of the need of the employer, he is deliberately and

knowingly—that is, willfully—violating the statutory mandate, and cannot pretend that the statute is too indefinite for him to know that his conduct is unlawful.

It thus cannot be said that Section 506 (a) (1) establishes a standard which the ordinary person cannot understand or that it subjects him to the danger of trial for an offense so vaguely defined as to give him no warning.

The Act, is, we think, at least as definite as others which have been upheld by this Court. In *Nash* v. *United States*, 229 U. S. 373, the Court held that the test of "unreasonable restraint of trade" in the Sherman Act was sufficiently definite.

In *United States* v. *Ragen*, 314 U. S. 513, "reasonable allowance for salaries or other compensation for personal services actually rendered" was held to be a valid standard, as long as *scienter* was an element of the offense. The Court there noted that "the jury would have had to consider whether or not the 'commissions' had intentionally been made excessive" (p. 520), a process not in substance differing from determining whether the number of employees demanded is excessive. The opinion states that (p. 523) "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct. Cf. *Nash* v. *United States*, 229 U. S. 373."

In *Kay* v. *United States*, 303 U. S. 1, 9, the Court upheld a statute punishing persons soliciting fees "except ordinary charges authorized * * * for services actually rendered for examination and perfecting of title, appraisal, and like necessary services." The last phrase, which on its face resembles that in question here, was held to draw meaning from its context and therefore to be sufficiently definite. Any doubts as to the meaning of paragraph (a) (1) can also be resolved by reference to its context in the statute.

Other cases which contain language no more definite than that here involved are. *Screws* v. *United States*, 325 U. S. 91; *Gorin* v. *United States*, 312 U. S. 19 (connected with the national defense); *Old Dearborn Distributing Co.* v. *Seagram Corp.*, 299 U. S. 183, 196 (fair and open competition); *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 18 (unreasonable waste of natural gas); *United States* v. *Alford*, 274 U. S. 264, 267 (near any forest or other inflammable material); *Miller* v. *Oregon*, 273 U. S. 657, as explained at 274 U. S., at 464–465 (dangerous rate of speed); *Omaechevarria* v. *Idaho*, 246 U. S. 343 (range usually occupied by any cattle grower); *Fox* v. *Washington*, 236 U. S. 273, 277 (or which shall tend to encourage or advocate disrespect for law or for any court). Additional cases are listed in *Gorin* v. *United States*, 312 U. S. 19, at 27.

The expression "needed to perform actual services" seems more definite than criteria modified by the adjectives "reasonable" or "unreasonable". Moreover, "needed" is clearly akin to "necessary", a phrase frequently used both at statutory and common law. An ingredient of a violation of the Fair Labor Standards Act is that work be "necessary to the production of goods for commerce". Cf. *Armour & Co.* v. *Wantock*, 323 U. S. 126, 129. Many States have or have had statutes forbidding all labor or business on the Sabbath except works of necessity. *Powhatan Steamboat Co.* v. *Appomattox R. R. Co.*, 24 How. 247; *Francisco* v. *Commonwealth*, 180 Va. 371, 23 S. E. 2d 234, 239 (1942);[4] Wharton, *Criminal Law* (12 Ed. 1932) Sec. 1700; 29 A. L. R. 1298. So far as can be ascertained, none of these statutes has ever been held unconstitutional on the ground of indefiniteness. At common law, guilt of crime often turns on whether otherwise criminal acts were necessary in the circumstances. Wharton *Cr. Law* (12th Ed. 1932) sec. 126 *et seq.* Thus,

[4] In this case the question was whether the sale of beer on Sunday was a work of necessity. It was held that this was a question of fact for the jury. The court based its opinion on the ground that the meaning of the word "necessary" differs according to time, place and circumstances. Consequently, it ordered that the jury be charged that necessary work was "all work reasonably essential to the economic, social and moral welfare of the community." Despite the flexible definition approved by the court, neither court nor counsel raised any question as to the sufficiency of the standard for the purpose of defining a crime.

when the defense of self-defense is raised in a prosecution for murder, the jury determines whether a necessity to take life existed. Wharton *Cr. Evidance* (11th Ed. 1935) sec. 322.

Appellee may seek to distinguish the *Nash* and *Ragen* cases on the ground that the expression in the Sherman Act had a well-settled meaning at common law, and that that involved in the tax case was "of long standing". But conceding this, and taking these factors into account, we believe that those statutes furnished no surer guide to their meaning in particular situations than the phrase involved here. That is the controlling factor, not the age of a statute or rule when it first is challenged in this Court.

We recognize that the process of matching words and phrases in statutes in order to determine whether one is as definite as another is difficult, and that the question in each case must ultimately be one of judgment based largely on the context of the particular law and the subject with which it deals. But the cases viewed as a whole contain several underlying principles, which we think point the way to a correct decision here if it is thought that the text of the law itself is not sufficiently definite.

D. *Scienter or Willfulness*

Of greatest importance is the significance which this Court has properly attached to the existence of a requirement of *scienter*. In no case in which

scienter was clearly made an element of the offense has the Court held a statute invalid for indefiniteness.[43] And, conversely, in a number of cases the Court has clearly indicated that the presence of such a requirement removes any question as to an act's validity. *United States* v. *Ragen*, 314 U. S. 513, 523–524; *Gorin* v. *United States*, 312 U. S. 19, 27–28; *Screws* v. *United States*, 325 U. S. 91, 101–105; *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348; *Hygrade Provi-*

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[43] Section 4 of the Lever Act was held invalid in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Weeds, Inc.* v. *United States*, 255 U. S. 109; *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233. The statute as quoted in 255 U. S. at 86 reads as though intent were required. But the full text of the Section, as set out in 255 U. S. at 81–82, shows that intent was no part of the clauses under attack.

The accumulation of statutes held invalid in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, and *Collins* v. *Kentucky*, 234 U. S. 634, was construed by the state court to make unlawful any combination "for the purposes *or with the effect* of fixing a price that was greater or less than the real value of the article" (234 U. S. at 221). [Italics added.]

The statute condemned in *Herndon* v. *Lowry*, 301 U. S. 242, did not in terms require intent, but, as construed by the state court, punished the attempt to incite insurrection, if force was contemplated by the inciter "at any time within which he might reasonably expect his influence to continue" (301 U. S. at 254–255). The statute as thus construed might be thought to require either (1) an intent to stimulate force and violence, or (2) an intent to utter words which "might, at some time in the indefinite future" (301 U. S. at 262), lead to force and violence. It is clear that this Court adopted the latter construction, and thus assumed that the statute reached a person, "however peaceful his own intent" (301 U. S. at 262).

sion Co. v. *Sherman*, 266 U. S. 497, 502–503. This line of demarcation is entirely reasonable. "The constitutional vice" in an indefinite statute "is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. See *United States* v. *Cohen Grocery Co., supra.* But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U. S. at 101–102. In *United States* v. *Ragen*, 314 U. S., at 524, the Court said with respect to a similar statutory provision: "On no construction can the statutory provisions here involved become a trap for those who act in good faith. A mind intent upon willful evasion is inconsistent with surprised innocence."

The same reasoning, we believe, applies to the Lea Act. That Act, as we have explained, applies only where there has been a deliberate violation

with an intention to do the acts proscribed by Congress or an utter or reckless disregard for the congressional mandate. See pp. 104–118, *supra*. Here too an act cannot "become a trap for those who act in good faith."

We do not suggest that the presence of a requirement as to willfulness will without more be sufficient in a statute to satisfy the Due Process Clause. See *Screws* v. *United States*, 325 U. S., at 103, 105, 151–153. In the *Screws* case the Court divided as to whether the statute there involved was of that sort. But that statute was an exceptional one. The opinion of Mr. Justice Douglas sustains it both because of the necessity of *scienter* and because it would be known to be applicable to the extent that the constitutional rights therein referred to had been "made definite by decision or other rule of law" (p. 103). Here we have no language anything like as general as "deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States". Here we have a test, which, like that in the *Ragen* and *Omachevarria* cases, has a meaning which even apart from *scienter*. the normal person—and certainly persons familiar with the industry affected—would understand and have no difficulty in applying except in the inevitable borderline cases. The area of certainty as to the statute's application covers all the illustrative situations presented to the Con-

gress and heretofore discussed. These are reached upon the basis of the language of the statute itself, without the need for resort to external decisions and rules such as was called for in the *Screws* case because of the lack of definition in the statutory language. This area of certainty serves the same purpose in much more comprehensible and orthodox form as those external aids.

As in these decisions other than the *Screws* case in which *scienter* was thought to overcome any doubts as to indefiniteness, there is here, at worst, a phrase of reasonably specific meaning but as to the precise bounds of which a person might have doubts. The necessity of a willful violation serves to remove the danger of a person inadvertently involving himself within the border area. For this reason we think that any doubt as to the specificity of the statutory language must be resolved in the Act's favor by reason of the requirement of willfulness construed as we have suggested.

E. *The necessity for a general standard*

We think it also important that Congress could not have accomplished its aim of freeing interstate radio broadcasting from the injury caused by this type of featherbedding if the language used in the Act is not sufficiently precise. The evil at which Congress was aiming was clear,

and the language of the Act covers it. In order to wipe out practices which it reasonably regarded as harmful to the public interest, Congress had the alternatives of setting forth a general rule or of itself prescribing the number of employees which employers could be forced to hire.

In view of the great number of diverse situations which Congress wished the Act to reach, the latter choice was obviously impossible. Thus unless some generalized method of statement was sufficient, Congress would be unable to penalize those who coerce broadcasters to hire unneeded personnel.

This Court has recognized that the ideal of complete specificity must yield to the practical requirements of legislation. In *Miller* v. *Strahl*, 239 U. S. 426, 434, it said:

> Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary. * * *

See, also, *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 18; *Miller* v. *Oregon*, 273 U. S. 657 (discussed in 274 U. S. at 464–465); *Mulkern* v. *State*, 176 Wis. 490, 493, 187 N. W. 190 (1922). We submit that the language employed by Congress is as specific as the nature of the problem permits, and that this is a strong factor weighing in favor of the Act's constitutionality.

F. *The possible existence of borderline cases does not make a law unconstitutionally indefinite*

There may, of course, be cases in which there could be a reasonable dispute as to how many workers are needed to perform services, and in which employees may have basis for claiming that their hours are too long or that the work burden on them is so great as to require additional help. But those were not the cases which Congress meant this statute to reach, as we have demonstrated, *supra*, pp. 104–113. Such cases of *bona fide* dispute, in which employees or their representatives were really concerned as to working conditions of the employees, thus would not come within the statutory provision.

Furthermore, as this Court has several times noted (even in a case involving the death penalty), "in most English words and phrases there lurk uncertainties." *Robinson* v. *United States*, 324 U. S. 282, 286. "'Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash* v. *United States*, 229 U. S. 373.'" "* * * we imagine that no one not in search of trouble would feel any." *United States* v. *Wurzbach*, 280 U. S. 396, 399.

Clearly the fact that there may be doubtful cases does not render a statute unconstitutionally indefinite. Men ordinarily speak in words which lack a mechanical precision of denotation. There will be found around almost every statute an inevitable fringe of uncertainty and doubt. This periphery of indefiniteness may be more extensive in some cases than in others but its existence is ordinarily inescapable.

A statute will therefore not be found constitutionally indefinite because of the possibility of doubt in peripheral cases. If there is a hard core of circumstances to which a statute will unquestionably apply, as to which the ordinary person would have no doubt as to its application, and if this constitutes the mass of situations with which the act deals, constitutional requirements are fulfilled. Such a statute would not contravene the notion of fair dealing embodied in the Due Process Clause. Even apart from the additional protection afforded by the requirement of willfulness, Section 506(a)(1) is such a law.

Appellee has referred to statements in the Congressional debates by Senator Johnson that the district attorney (92 Cong. Rec. 3245) and the court (*id.*, at 3256) determine whether the number of employees demanded is in excess of the number needed.[a] As in any case, under this stat-

[a] Senator White stated on one occasion that the employer made the determination. 92 Cong. Rec. 3256. This was obviously wrong (see pp. 114–116, *supra*), and was immediately corrected by Senator Johnson.

ute no person can be convicted unless the prosecuting attorney first determines that in his opinion the Act is violated, and unless the court, (including the jury) ultimately agrees. Under paragraph (a) (1) of the Act the prosecutor and the court must be satisfied that a defendant is seeking to force the employment of more employees than are needed for actual services, and also that the demand was willfully made,—that is that the defendant either knew that the employees were not needed or did not care whether they were or not. Senator Johnson's remarks, which were addressed to the first of these statutory requisites, mean no more than that.[*]

This Court has not held that, merely because questions of statutory application must be passed on by a court of jury, with the inevitable uncertainties of litigation, a statute was unconstitutional. Such a test would condemn almost every law. In *United States* v. *Ragen*, 314 U. S. 513 it could equally as well have been said that a person making an income tax deduction was gambling as to whether a prosecutor, judge or

[*] Senator Johnson also stated, perhaps over-optimistically (92 Cong. Rec. 3246):

"* * * I do not think it will call for any court interpretations, because the language is so plain that I do not believe it will ever reach the courts. But if by any chance the parties should go to the courts, that is where the final decision would be made."

jury might later find it unreasonable. As Mr. Justice Holmes declared for the Court in *Nash* v. *United States*, 229 U. S. 373, 377:

> * * * the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. * * *

Subsequently in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223, the Court, again speaking through Mr. Justice Holmes, stated that "the reason" for holding the statute unconstitutionally indefinite:

> * * * is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind.

Here we have no "imaginary ideal", but an expression which has a clear and definite meaning, although, as with every other statutory expression, there may be room for difficult cases on the borderline. But a defendant would not be prejudiced by any such difficulty in determining the number needed under this statute in view of the additional requirement that penalties can not be imposed unless his conduct is also willful.

G. Since this case clearly falls within the statutory prohibition appellee has no standing to contend that the Act is too indefinite

We submit further that appellee has no standing to raise the issue of indefiniteness. The information alleges that he willfully sought to coerce Station WAAF to employ three persons not needed for the performance of actual services. It must be assumed here that the Government can substantiate this charge and that the case therefore presents a situation in which there can be no doubt that the Act has been violated.

In *Robinson* v. *United States*, 324 U. S. 282, 286, the Court said in a case in which the conduct of the defendant was found clearly to come within the statute:[46]

> * * * We do not know what provision of law, Constitutional or statutory, gives us power wholly to nullify the clearly expressed purpose of Congress to authorize the death penalty because of a doubt as to the precise congressional purpose in regard to hypothetical cases that may never arise.

[46] In the *Robinson* case there had been a trial and it was clear from the facts of the particular case that the statute had been violated. In the present case there has been no trial since the court below sustained appellee's motion to dismiss the information. But the Government should not be prejudiced by the fact that it has not yet been able to prove its allegations. Since they are to be accepted as true on the motion to dismiss, the case must be regarded as in the same posture as if the Government had proved them.

See also *Fox* v. *Washington*, 236 U. S. 273, 277; *Miller* v. *Strahl*, 239 U. S. 426, 432–433; *United States* v. *Wurzbach*, 280 U. S. 396, 399. In the *Fox* case the Court said (p. 277):

> If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness.

These rulings are in accordance with the principal that a litigant can challenge the validity of an act only when it is applied to his own disadvantage. *Yazoo & Mississippi Ry. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219; *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226; *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 455; *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183. A statute may be invalid as applied to one set of facts and valid as applied to another. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wynne*, 224 U. S. 354; *Kansas City Southern Ry. Co.* v. *Anderson*, 233 U. S. 325; *Poindexter* v. *Greenhow*, 114 U. S. 270, 295. See pp. 135, *et seq.*, *infra*. We submit that these established principles of constitutional litigation are equally applicable in the case of a statute challenged as too indefinite.

VII

THE ISSUES IN THIS CASE RELATE TO THE VALIDITY OF THE LEA ACT WITH RESPECT TO THE FACTS ALLEGED IN THE INFORMATION

In the preceding argument we have assumed that this case involves only the portion of the statute upon which the information rests, and that the Court would not concern itself with any but the precise facts charged in the present information. In *United Public Workers* v. *Mitchell*, No. 20, decided February 10, 1947, slip sheet, p. 13, this Court has recently reaffirmed its "'considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied, . . .' *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461, and cases cited. See *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, No. 11, October Term, 1946, decided December 9, 1946."

In the *McAdory* case the Court further stated (325 U. S. at 462):

> A law which is constitutional as applied in one manner may, it is true, violate the Constitution when applied in another.

Field v. *Clark*, 143 U. S. 649, 694–7; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 289; *Concordia Ins. Co.* v. *Illinois*, 292 U. S. 535; *Associated Press* v. *Labor Board*, 301 U. S. 103. But "Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications" this Court has felt bound to delay passing on "the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured." *Watson* v. *Buck*, 313 U. S. 387, 402. * * *

The only basis for a departure from these long recognized principles which appellee urges is that Section 506 is inseparable, so that if any provision or application of it is invalid the entire section must fall. We do not believe that any provision or application of the Lea Act is unconstitutional. Nevertheless, since this brief is directed in the main to what we conceive to be properly before the Court in this case, and since we think appellee clearly wrong in his theory as to the scope of the issues, it seems advisable to meet his argument. Appellee has raised this point primarily in answer to our suggestion that since the information alleges only that appellee has caused and directed others to refrain from

working, it does not present any question as to the right to strike.[*]

It is apparently appellee's position that if any application of the statute might be unconstitutional, the entire law must fall. As this Court said of a similar argument, also based upon a claim that the First Amendment was violated: "It seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132; see also *Crowell* v. *Benson*, 285 U. S. 22, 62; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30; *United Public Workers, et al.* v. *Mitchell*, No. 20, October Term, 1946, decided February 10, 1947, slip sheet, p. 13).

A. CONGRESS INTENDED THE ACT TO STAND INSOFAR AS WAS POSSIBLE, AND THE ACT IS SEVERABLE

There can be no question both that the Lea Act can without difficulty be applied to those factual situations which validly come within it, and that Congress intended it to stand insofar as it possibly could. This suffices to make the Act sepa-

[*] In Point III B, *supra*, pp. 47–68, we have argued that in any event the Act does not violate any constitutional guarantee with respect to the right to strike.

rable under the commonly accepted rule as to separability. *Dorchy* v. *Kansas*, 264 U. S. 286, 289–290; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 234; *Warren* v. *Mayor of Charlestown*, 2 Gray 84 (Mass., 1854). Or as the Court stated in *Jaehne* v. *New York*, 128 U. S. 189, 194, citing Cooley, *Constitutional Limitations:*

> * * * The rule upon this subject, which we consider applicable, is that "a legislative act may be entirely valid as to some classes of cases and clearly void as to others. * * * but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control."

See also *The Abby Dodge*, 223 U. S. 166; *In re Chapman*, 166 U. S. 661; *Louisville, N. O. & Texas Ry. Co.* v. *Mississippi*, 133 U. S. 587; *Eilenbecker* v. *Plymouth County*, 134 U. S. 31; *In re Rahrer*, 140 U. S. 545, 563; *Smiley* v. *Kansas*, 196 U. S. 447; *Rearick* v. *Pennsylvania*, 203 U. S. 507.

Clearly here it is possible for the Lea Act to operate insofar as it may be given constitutional application. There is no reason why all valid applications of Section 506 may not be given legal effect by themselves. If we assume, *arguendo*, an inability to apply the Act's prohibitions to certain sets of facts, this would in no way impede or otherwise affect the application of the statute to

other sets of facts. If the Act is ever sought to be applied invalidly, all constitutional rights involved will be adequately safeguarded by the courts when such a case arises.

Nor can there be any dispute as to the intention of Congress in view of the background and stated purposes of the present Act. Congress sought to stamp out the use of coercion to compel broadcasters to succumb to types of demands which Congress thought were illegitimate and contrary to the public interest. It forbade coercion "by the use or expressed or implied threat of the use of force, violence, intimidation or duress, or by the use of express or implied threat of the use of other means." Appellee's argument is that if some "means" of coercion may not be constitutionally prohibited, it must be assumed that Congress would have meant the entire Act to fall rather than to have the law stand insofar as means of coercion within the power of Congress are included within the prohibition. The mere statement of the proposition demonstrates the absurdity of attributing to Congress any such intention.

Insofar as the particular point of separability raised by appellee is concerned, the intention of Congress can hardly be disputed. The history of the Act unquestionably demonstrates that it resulted from Petrillo's demands upon the broadcasting industry. H. Rep. 1508, 79th Cong., 2d sess., p. 2, *infra*, p. 160. Such demands are enforce-

able by reason of his power to direct other persons to refrain from working—a power which is clearly not constitutionally protected, as we have shown (pp. 40–46, *supra*), whatever may be said for the right to strike itself. If the statute lawfully prevents this method of coercion to enforce the specified unlawful demands, it is not unlikely that a major portion of its objectives will have been achieved. Congress undoubtedly would have intended the Act to go that far. If it is clear that Congress meant a law to cover the facts presented in a particular case, the Court will not concern itself with whether on other facts the law might be valid. *Robinson* v. *United States*, 234 U. S. 282, 286.

B. THE SEPARABILITY CLAUSE

The test we have applied is controlling whether or not there is a separability clause. See, for example, *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 598, wherein the Court, in affirming separability, stated that "without a severability clause we should still be led to that conclusion." And see cases cited, *infra*, pp. 143–144. Appellee urges, however, that Section 506 contains no separability clause and that certain decisions of the Court say that in the absence of a separability clause it is to be presumed that Congress intends a statute to stand or fall as an entirety. It is our position (1) that Section 506 is part of the Federal Communications Act, which does contain a controlling

separability clause, (2) that, assuming no clause to be applicable, any presumption of inseparability would be rebutted by the obvious intention of Congress in enacting this statute, and (3) that there is no sound basis for the dicta in several decisions to the effect that the absence of a separability clause manifests a congressional intention that a law stand or fall as a unit.

1. *The Federal Communications Act contains a separability clause*

Appellee treats the present statute as if there were no separability clause. It is true that Section 506, as added to the Communications Act in 1946, contains no such clause. But that section is merely an amendment to the Communications Act, as appears clearly from the title and introductory provision. (See p. 153, *infra.*) And Section 608 of that Act, 48 Stat. 1105 (47 U. S. C. 608) contains such a clause for the entire statute. Section 608 states that:

> If any provision of this Act *or the application thereof* to any person or circumstance is held invalid, the remainder of the Act and *the application of such provision to other persons or circumstances* shall not be affected thereby. [Italics supplied]

Clearly, Section 608 applies to the entire Communications Act, including subsequent amendments. In the first place, the section in terms declares that it applies to "any provision of this

Act." And Section 506, like other amendments, is expressly stated to be a part of the Communications Act. It would clearly be impractical, as well as unnecessary, for Congress to have inserted a new separability clause in each of the numerous amendments to the Communications Act since its original enactment in 1934. There was no special reason for its doing so when Section 506 was added to the statute, inasmuch as Congress must be presumed to have been aware of the existence of Section 608.

It is well established as a matter of general law that amendments to a statute are to be treated as a part of the statute and not as entirely separate legislation. In construing any statute, regard must be had not only for all parts of the act itself, but also "to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment." *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653. The settled rule is that the statute, as amended, is "to be read, as to all subsequent occurrences, as if [it] had originally been in the amended form." *United States* v. *LaFranca*, 282 U. S. 568, 576. Thus, Section 608 was a part of the original act and remains unchanged; and the amendment added by the Lea Act is to be read in connection with Section 608 "as if it were originally incorporated" in the original act. *Pennsylvania Co.* v.

United States, 236 U. S. 351, 362. See also *Blair* v. *Chicago*, 201 U. S. 400, 475, where the Court adopted as correct the rule stated in Endlich on *Statutes*, Section 294, as follows:

> A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there, *and the amendment itself so thoroughly becomes a part of the original statute, that it must be construed in view of the original statute, as it stands after the amendments are introduced.* * * * [Italics added.]

See also *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217; *Steffler* v. *Johnston*, 121 F. 2d 447 (C. C. A. 9), certiorari denied, 314 U. S. 676; *McClure* v. *United States*, 95 F. 2d 744, 750 (C. C. A. 9), affirmed, 305 U. S. 472; *Baxter* v. *McGee*, 82 F. 2d 695, 700 (C. C. A. 8), certiorari denied, 298 U. S. 680; *Balanced Rock Scenic Attractions* v. *Town of Manitou*, 38 F. 2d 28, 29 (C. C. A. 10), certiorari denied, 281 U. S. 764; *Kelleher* v. *French*, 22 F. 2d 341, 347 (W. D. Va.); *Cumberland Telephone & Tel. Co.* v. *City of Memphis*, 200 Fed. 657, 660–661 (C. C. A. 6); *In re Nelson*, 11 F. Supp. 733 (W. D. N. Y.); *United States* v. *Woolsey*, 28 Fed. Cas. No. 16763 (S. D. N. Y.).

If, as we believe, the separability clause in Section 608 is controlling; there is a strong, though not completely irrebuttable, presumption,

that Congress intends the statute to stand to the extent constitutionally possible. As this Court said in *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 434:

> Congress has thus said that the statute is not an integrated whole, which as such must be sustained or held invalid. On the contrary, when validity is in question, divisibility and not integration is the guiding principle. Invalid parts are to be excised and the remainder enforced. When we are seeking to ascertain the congressional purpose, we must give heed to this explicit declaration.

See also the statement of Chief Justice Hughes, dissenting with Justices Brandeis, Stone and Cardozo, in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 322:

> * * * when Congress states that the provisions of the Act are not inseparable and that the invalidity of any provision shall not affect others, we should not hold that the provisions are inseparable unless their nature, by reason of an inextricable tie, demands that conclusion.

2. *Any presumption of inseparability would be rebutted by actual legislative intention*

Even if we assume *arguendo* that the separability clause is not applicable to Section 506, the result will be the same. Although this Court has said in a series of cases beginning with *Williams*

v. *Standard Oil Co.*, 278 U. S. 235,[a] that in the absence of a separability clause there is a presumption of inseparability, such a presumption is by no means conclusive. We cite below forty-seven cases in which this Court has held statutes severable despite the absence of a separability clause.[b]

The basic question is still what would Congress have intended—would it have desired that a statute be applied so far as is constitutionally possible? The considerations set forth above (*supra*, pp. 137–138), are, we think, sufficient to rebut any contrary presumption here. The certainty that Congress would have wanted the Act to go as far as was lawfully possible is clearly sufficient to show that the statute should be construed as separable despite the assumed absence of a separability clause.

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[a] *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 184; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 235; *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, 362; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 434.

[b] *Steward Machine Co.* v. *Davis*, 301 U. S. 548, quoted *supra*, p. 138; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *Field* v. *Clark*, 143 U. S. 649; *United States* v. *Cox*, 155 U. S. 76; *In re Chapman*, 166 U. S. 661; *New York Central R. R.* v. *United States*, 212 U. S. 481; *El Paso & N. E. Ry.* v. *Gutierrez*, 215 U. S. 87; *Kimmish* v. *Ball*, 129 U. S. 217; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Waters-Pierce Oil Co.* v. *Deselms*, 212 U. S. 159; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433; *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57; *Western*

3. *There is no basis for a presumption of inseparability*

Finally, we submit, the rule of *Williams* v. *Standard Oil Co.*, *supra*, that a statute is presumptively inseparable in the absence of a separability clause lacks both a rational and a historical foundation. Although this statement has been repeated in the cases cited above (note 14, p. 143), it has never actually been given effect by the Court, as each of the cases cited involved a statute

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Union Tel. Co. v. *Richmond*, 224 U. S. 160; *Southern Pac. Co.* v. *Campbell*, 230 U. S. 537; *Louisville & Nash. R. R. Co.* v. *Garrett*, 231 U. S. 298; *Grand Trunk Ry.* v. *Michigan R. R. Comm.*, 231 U. S. 457; *St. Louis, S. W. Ry.* v. *Arkansas*, 235 U. S. 350; *Railroad Companies* v. *Schutte*, 103 U. S. 118; *Unity* v. *Burrage*, 103 U. S. 447; *Penniman's Case*, 103 U. S. 714; *Presser* v. *Illinois*, 116 U. S. 252; *McPherson* v. *Blacker*, 146 U. S. 1; *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472; *Carey* v. *South Dakota*, 250 U. S. 118; *International Bridge Co.* v. *New York*, 254 U. S. 126; *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668; *Tuttle* v. *Lake Erie & W. R. R.*, 175 U. S. 348; *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611; *Berea College* v. *Kentucky*, 211 U. S. 45; *Tiernan* v. *Rinker*, 102 U. S. 123; *Huntington* v. *Worthen*, 120 U. S. 97; *Jachne* v. *New York*, 128 U. S. 189; *McCullough* v. *Virginia*, 172 U. S. 102; *The Abby Dodge*, 223 U. S. 166; *Missouri Rate Cases*, 230 U. S. 474; *In re Rahrer*, 140 U. S. 545, 563; *Louisville, N. O. & Texas Ry. Co.* v. *Mississippi*, 133 U. S. 587; *Eilenbecker* v. *Plymouth County*, 134 U. S. 31; *Smiley* v. *Kansas*, 196 U. S. 447; *The State Freight Tax Case*, 15 Wall. 232; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Hatch* v. *Reardon*, 204 U. S. 152; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 646–647.

containing a separability clause. The remarks as to the rule applicable for other types of statutes not before the Court in any of those cases are therefore only dicta.

Since separability is fundamentally a matter of legislative intention, the presumption can have justification only if it reflects the manner in which Congress and other legislatures customarily operate. The presumption that, in the absence of a separability clause, laws are to be presumed incapable of separation can only be defended on the ground that legislatures avail themselves of separability clauses whenever they desire the provisions of a law to be severable, and fail to use the device only because they have a contrary intention. Whether legislatures exercise such nice discrimination is to be doubted. Separability clauses have probably been employed when and because the draftsmen of a statute had doubts as to whether the courts would sustain a law *in toto*. The absence of such doubts, or careless draftsmanship, are more likely than the existence of an intention that the law be treated as inseparable to be responsible for the failure to incorporate such a provision in a statute. The presumption assuming as a fact that legislators omit separability clauses because they intend statutes to fall *in toto* is thus hardly consistent with common knowledge as to the workings of the legislative process.

Historically, the problem was approached in precisely the opposite manner.[50] In the first edition of Judge Cooley's treatise on *Constitutional Limitations;* published in 1868, the author stated (pp. 180–181):

> A legislative act may be entirely valid as to some classes of cases, and clearly void as to others * * *. In any such case the unconstitutional law must operate as far as it can, and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the constitution forbids. If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general pur-

[50] See *Bank of Hamilton* v. *Dudley*, 2 Pet. 492, 526; *Sturges* v. *Crowninshield*, 4 Wheat., 122, 208; *City of New York* v. *Miln*, 11 Pet. 102, 142; *The State Freight Tax Case*, 15 Wall. 232, 282; *Supervisors* v. *Stanley*, 105 U. S. 305, 311; *Field* v. *Clark*, 143 U. S. 649, 695; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 394–395; *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 489; *Glenn* v. *Humphreys*, 10 Fed. Cas. No. 5,480 at 472 (C. C. E. D. Pa.); *Wellington, petitioner*, 16 Pick. 87, 96 (Mass.); *Commonwealth* v. *Kimball*, 24 Pick. 359, 362 (Mass.); *Norris* v. *City of Boston*, 4 Met. 282 (Mass.); *Mundy* v. *Monroe*, 1 Mich. 68, 76; *Mayor of Savannah* v. *State*, 4 Ga. 26, 38; *State* v. *Snow*, 3 R. I. 64, 70; *Fisher* v. *McGirr*, 1 Gray 1 (Mass.); *People* v. *Hill*, 7 Cal. 97, 103; *Santo* v. *Iowa*, 2 Iowa 165, 205; *Campbell* v. *Mississippi Union Bank*, 7 Miss. 625, 676–678; *Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 1; *Commonwealth* v. *Hitchings*, 5 Gray 482 (Mass.).

> pose of the legislature will be defeated if it shall be held valid as to some cases and void as to others.

And the many cases cited in note 45, *supra*, pp. 143–144, show that no such presumption was applied before *Williams* v. *Standard Oil Co.* In these cases the Court assumed that statutes were separable and that valid parts should stand unless the opposite was clearly shown. This attitude would clearly seem to be the proper one; the courts should attempt to effectuate rather than to thwart legislative policies. The presumption of inseparability in the absence of a specific clause pointing in the contrary direction is indeed hardly compatible with the principles that a statute is to be presumed to be constitutional and to be given a constitutional construction where necessary to sustain its validity.

We submit that for questions of separability, as well as for other issues of statutory construction, the proper approach is through the normal canon of interpretation that a law should be construed to be valid insofar as possible. This, we believe, conforms to the normal intention of the legislature. The dicta in *Williams* v. *Standard Oil Co.* to the contrary should not be followed.

C. *"Thornhill* v. *Alabama" is not applicable*

Appellee relies on the statement in *Thornhill* v. *Alabama*, 310 U. S. 88, 98:

> * * * Where regulations of the liberty of free discussion are concerned, there are

> special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359, 368; *Schneider* v. *State*, 308 U. S. 147, 155, 162–163. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451.

But the *Thornhill* case involved a statute "baldly prohibiting all picketing", "an unlimited ban on free communication". See *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 297. The criminal complaint, as the Court noted, was "framed in the words of the statute" (p. 96). The Court analogized such a law prohibiting a method of speech generally to statutes "purporting to license the dissemination of ideas" (p. 97), which were void on their face apart from any application "by reason of the threat to censure comments on matters of public concern" (*ibid.*). The opinion then states (*ibid.*):

> * * * A like threat is inherent in a penal statute, like that in question here, *which does not aim specifically at evils within the allowable area of state control* but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. [Italics supplied.]

This passage, which appellee has emphasized (reply brief, p. 10), shows that the Court was con-

cerned with a statute directed at restraining the freedoms protected by the First Amendment, such as the laws in the *Thornhill* case and the cases cited therein, not statutes "aim[ed] specifically at evils within the allowable area of state control." Cf. *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc., supra.*

Section 566 is not a limitation on freedom of speech or the press or a regulation of the "liberty of free discussion." It reaches only coercion by any means when directed at particular objectives, an evil clearly within the allowable area of Government control, just as the National Labor Relations Act prohibits coercion or interference by employers with the bargaining rights of employees. The former is no more unconstitutional *in toto* because conceivably (though not concededly) some means of coercion might be regarded as protected by the First Amendment than is the latter.

In its subsequent decision in *Jones* v. *Opelika*, 316 U. S. 584, the Court upheld the imposition of license taxes on the vending of religious literature, without passing on the validity of the revocation provision of the statute, saying (p. 599):

> From what has been said previously, it follows that the objection to the unconstitutionality of requiring a license fails. There is no occasion, at this time, to pass on the validity of the revocation section, as it does not affect his present defense.

The opinion had earlier declared (316 U. S. at 596), in distinguishing *Schneider* v. *State* and *Lovell* v. *Griffin*:

> There is to be noted, too, a distinction between nondiscriminatory regulation of operations which are incidental to the exercise of religion or the freedom of speech or the press and those which are imposed upon the religious rite itself or the unmixed dissemination of information.

These passages from the *Opelika* opinion indicate the difference between the law involved in the *Thornhill* case and the Lea Act. The former was a direct regulation of a form of speech. The latter is a general regulation of other conduct which affects speech only incidentally. The restrictive impact of the statute of the former type upon speech and writing justifies this Court in viewing such laws with special care. But the Lea Act does not fall in that category.

VIII

THE INFORMATION MUST STAND IF ANY ONE OF THE THREE MEANS OF COERCION CHARGED STATES A VALID OFFENSE

This Court need hold that only one of the three means of coercion charged in the information may be constitutionally prohibited in order to warrant denial of appellee's motion to dismiss. The information charges appellee with having attempted to coerce station WAAF (1) by directing and caus-

ing persons to discontinue employment, (2) by directing and causing persons not to accept employment, and (3) by placing and causing a picket to be placed in front of the station's place of business. If the statute may be validly applied to coercion by any of these means, a holding of invalidity as to the others would not vitiate the information. The allegations relating to the other means of committing the offense could then be treated as surplusage and disregarded. See *Ford* v. *United States*, 273 U. S. 593, in which the indictment charged a conspiracy to import intoxicating liquors in violation of the tariff act and a treaty with Great Britain. Although the acts charged were not in violation of the treaty, the Court held that such allegations could properly be rejected as surplusage. See also *Sondericker* v. *United States*, 41 F. 2d 144 (C. C. A. 7), in which the indictment charged the appellee with maintaining a nuisance in that he sold and possessed for sale for beverage purposes, certain intoxicating liquor. The court held that, even if possession for sale did not constitute a means of committing the offense, the indictment was good since proof of sale of liquor on the premises would alone support the conviction. The court there said (p. 146):

> The indictment is not for the act of selling or possessing for sale, but for maintaining a nuisance through the several alleged means. The means are disjunc-

> tively stated in the statute. Any valid one of several means charged will, if proved, sustain the charge and uphold a conviction thereon. * * *

Here the offense is coercion for the purpose of securing the employment of more persons than were actually needed to perform service by any of the three means specified. Hence, if coercion by any of these means may constitutionally be prohibited the information must be sustained.

CONCLUSION

For the above reasons it is respectfully submitted that the judgment of the district court should be reversed.

DOUGLAS MCGREGOR,
The Assistant to the Attorney General.
GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT L. STERN,
Special Assistant to the Attorney General.

APRIL 1947.

APPENDIX A

The Act of April 16, 1946, Pub. No. 344, 79th Cong., 2d Sess., 47 U. S. C. 506, provides as follows:

AN ACT To amend title V of the Communications Act of 1934 so as to prohibit certain coercive practices affecting radio broadcasting.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title V of the Communications Act of 1934, as amended, is amended by inserting after section 505 thereof the following new section:

"COERCIVE PRACTICES AFFECTING BROADCASTING

"SEC. 506. (a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—

"(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services; or

"(2) to pay or give or agree to pay or give any money or other thing of value in lieu of giving, or on account of failure

to give, employment to any person or persons, in connection with the conduct of the broadcasting business of such licensee, in excess of the number of employees needed by such licensee to perform actual services; or

"(3) to pay or agree to pay more than once for services performed in connection with the conduct of the broadcasting business of such licensee; or

"(4) to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensee, which are not to be performed; or

"(5) to refrain, or agree to refrain, from broadcasting or from permitting the broadcasting of a noncommercial educational or cultural program in connection with which the participants receive no money or other thing of value for their services, other than their actual expenses, and such licensee neither pays nor gives any money or other thing of value for the privilege of broadcasting such program nor receives any money or other thing of value on account of the broadcasting of such program; or

"(6) to refrain, or agree to refrain, from broadcasting or permitting the broadcasting of any radio communication originating outside the United States.

"(b) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel or constrain a licensee or any other person—

"(1) to pay or agree to pay any exaction for the privilege of, or on account of, producing, preparing, manufacturing, selling, buying, renting, operating, using, or maintaining recordings, transcriptions, or mechanical, chemical, or electrical reproductions, or any other articles, equipment, machines, or materials, used or intended to be used in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or

"(2) to accede to or impose any restriction upon such production, preparation, manufacture, sale, purchase, rental, operation, use, or maintenance, if such restriction is for the purpose of preventing or limiting the use of such articles, equipment, machines, or materials in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or

"(3) to pay or agree to pay any exaction on account of the broadcasting, by means of recordings or transcriptions, of a program previously broadcast, payment having been made, or agreed to be made, for the services actually rendered in the performance of such program.

"(c) The provisions of subsection (a) or (b) of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed.

"(d) Whoever wilfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be

punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both.

"(e) As used in this section the term 'licensee' includes the owner or owners, and the person or persons having control or management, of the radio station in respect of which a station license was granted."

Approved April 16, 1946.

APPENDIX B

79TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT No. 1508

PROHIBITING CERTAIN COERCIVE PRACTICES AFFECTING RADIO BROADCASTING

January 29, 1946.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. LEA, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany H. R. 5117]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 5117) to amend title V of the Communications Act of 1934 so as to prohibit certain coercive practices affecting radio broadcasting, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 4, in lines 15 to 18, inclusive, strike out—

> shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not more than two years or by a fine of not more than $5,000—

and insert in lieu thereof—

> shall, upon conviction thereof, be punished by imprisonment for not more than one year or by a fine of not more than $1,000.

GENERAL STATEMENT

For some years the radio broadcasters of the Nation have been harassed by ever-increasing extortionate and racketeering demands to which they have been forced to yield by coercive methods. The tributes thus exacted are now measured by millions of dollars.

These exactions have not been in compensation for services performed for the broadcasters or in settlement of any obligations due from them. They have not been made for the enforcement of any rights due those who demanded them.

The object of this proposed legislation is to put an end to these exactions for the protection of the broadcasting industry and for the integrity of the Nation.

EVILS AT WHICH DIRECTED

Broadcasting has become one of the great industries of our time. It is now one of the chief means of communication of our Nation. It is one of our greatest implements for free speech. It promptly carries news to the remotest sections of the country. It is a forum for the discussion of our political, economic, and social problems. It is a source of information, education, entertainment, music, culture, and a vehicle for the messages of all religions, utilized by practically every home in the Nation.

In recent years the broadcasting industry has been subjected to extortionate demands enforced by coercive methods which increasingly threaten to restrict and handicap it in performing its rightful functions to the Nation.

Those making these demands, empowered by organized groups, not only have exacted tributes from the broadcasters but have assumed and exerted the power to say what shall and shall not be communicated over the radio. True, they have limited their dominations and demands to purposes which serve their particular groups, but nevertheless they have set a pattern for a like power of private control exerted for mercenary purposes over other phases of the broadcasting industry of the Nation. The same power exercised for other purposes, if permitted, might make the right of free speech only a name and establish censorship of broadcasting for private gain.

Those who make these demands subordinate the rights of the people of the Nation to an untrammeled broadcasting service to their own mercenary purposes. They in effect say to the broadcasters, and say to the makers of recordings, "You must pay this tribute or we will not permit you to give this service to the Nation." An effective power behind the threat is the boycott and strike.

AMERICAN FEDERATION OF MUSICIANS

The make-up and operation of the American Federation of Musicians scarcely justifies its classification as a labor union. Applicants for membership are received without conforming to any qualification of a musician. Only about one-third of them make their living primarily by musical service. The voting privileges of members are so allocated as to permit a minority domination through grossly unequal allotment of voting power.

In most cases demands of the character dealt with by this proposed legislation have been made on behalf of the American Federation of Musicians by James C. Petrillo, its president.

The bylaws of the American Federation of Musicians empower its president to promulgate and issue executive orders—

> which shall be conclusive and binding upon all members and/or locals; any such order may by its terms (*a*) enforce the constitution, bylaws, standing resolutions or other laws, resolutions or rules of the federation; or (*b*) may annul and set aside same or any portion thereof, except such which treat with the finances of the organization, and substitute therefor other and different provisions of his own making.

The federation thus composed is so organized that its membership has little control over its management or policy.

COERCIVE PRACTICES

The local broadcasters of the Nation are greatly dependent on the networks for rounding out their programs. This situation has augmented the coercive power of the Federation of Musicians in forcing compliance with its demands. Through coercive efforts, including boycotts and strikes and threats of boycotts and strikes against broadcasters, the networks and those who furnish materials for broadcasters, the industry has been forced to comply rather than suffer the penalizations that would follow a refusal to submit to these extortionate demands.

Among other things, the following demands upon the broadcasting industry have thus been

made in recent years: That broadcasters employ persons in excess of the number wanted; that in lieu of failure to employ such persons the broadcaster should pay to the federation sums of money equivalent to or greater than funds required for the employment of members of the federation; that payments for services already performed and fully paid for should be repeated; that payments should be made for services not performed; that broadcasters should refrain from broadcasting noncompensated, noncommercial educational or cultural programs; that broadcasters should refrain from broadcasting musical programs of foreign origin; that tributes should be paid for using recordings, transcriptions, and other materials used for broadcasting; that restrictions should be placed on the manufacture and use of recordings or transcriptions for the purpose of restricting or preventing the use of such materials for broadcasting; that tributes should be paid for recordings previously paid for; that dual orchestras should be employed for a single broadcast over two or more outlets; that over 400 small broadcast stations in the country having no live orchestras would be compelled to employ such orchestras; that the use of voluntary noncompensated orchestras be barred from broadcasts unless an orchestra of the Federation of Musicians were also employed or that the union was paid an equivalent or greater amount than the regular charge for a federation orchestra.

Some of these demands began several years ago but in recent years they have become more frequent and for enlarged purposes and amounts. These boycotts and strikes and threats have co-

erced compliance with a number of these demands, with pending demands now being greater than ever before. The amount of money extorted from the broadcasting industry by these methods, without moral right, has reached millions of dollars in amount and if demands now pending were granted it would, by these racketeering and extortion methods, require the broadcasting industry to pay tribute probably much in excess of $20,000,000 a year for peace against these boycotts, strikes, and threats.

The broadcasting industry has been surrendering to these demands for tribute to avoid the greater losses that would result from failure to comply.

MORAL QUALITY OF PRACTICES JUSTIFIES PENALIZATION

Under the terms of this bill certain specified types of coercive practices and demands are made unlawful. These prohibited practices are made misdemeanors and punishable as such.

The practices thus made unlawful are those directly affecting the broadcasting industry. By specific provisions of the bill it is not to be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right or legal obligation.

The perpetration of the offenses penalized by this bill involve moral turpitude akin to that of larceny, embezzlement, the acquisition of another's property by false pretenses, racketeering, and extortion. They are not within the legitimate activities of any organized association of in-

dividuals for the cooperative purpose of their accomplishment.

The right to strike for a lawful purpose cannot be twisted into a right to combine together to commit crimes.

The moral quality of the offenses defined in the bill fully justifies their penalization.

These extortionate exactions from the broadcasting industry have been and are being accomplished by means of threats, intimidation, and coercive power of boycotts and strikes and threats of boycotts and strikes.

The practices proposed to be prohibited by this legislation are to prevent only the unlawful acts as defined in this bill. A strike is a privilege or right exercised for lawful purposes. The law does not contemplate that strikes shall be used as a cloak for the commission of crimes. The provisions of this bill define these unlawful practices and penalize their perpetration.

The restrictions imposed are not a limitation upon the legitimate activities of any association or combination of individuals. There is no more sanctity in crime committed by a combination of individuals than by an individual perpetrator.

POWER AND DUTY OF CONGRESS

Congress clearly has the power and the duty of protecting the public against such exactions.

The greatest exponent of Anglo-Saxon law declared that a law is a rule of conduct prescribed by the supreme power in the state commanding what is right and prohibiting what is wrong. The first fundamental under this approach is as to

whether or not the act to be prohibited is wrong. In view of the record that has been made the answer to that question cannot be one of doubt. Conceding these practices are of such moral quality as to deserve condemnation as unlawful, the right and duty of Congress to suppress them are equally clear.

This bill provides no unjust limitation on the right to strike. The law recognizes the right to strike for lawful purposes and in a lawful manner. The right to strike should be exercised as other rights of the citizen. We have the right of free speech but that is not a justification for slander. We have the right to bear arms but that is not a justification of murder. Any persons may properly organize for lawful purposes but criminal purposes are beyond their legitimate function.

A DISSERVICE TO LABOR

The offenses committed in the name of the American Federation of Musicians are a great disservice to legitimate labor organizations as well as to the public.

The situation presented by this legislation should call for the support of all branches of organized labor to give their condemnation to such outrageous practices committed in the name of labor. Legitimate labor organizations cannot afford to give their condonation to such practices or approve of them by assuming their defense.

It is incredible to believe that in the long run such practices as those hereby inhibited can redound to the credit or advantage of any organization which yields itself to these sordid methods.

A TYPICAL APPROACH

A characteristic assumption of those who make these demands is carried in a wire from Mr. Petrillo to the networks in October 1945, as follows:

> This is to advise you that after the meeting between your company and the American Federation of Musicians held in my office the matter was further discussed and we came to the final conclusion that beginning Monday, October 29, 1945, wherever musicians play for FM broadcasting and AM broadcasting simultaneously the same number of men must be employed for FM broadcasting as are employed for AM broadcasting, which means a double crew must be employed. Kindly govern yourself accordingly.

The absurdity of such a demand is apparent. Two orchestras required for simultaneous broadcast would be an anomaly. It is reported that 1 of the networks has a staff orchestra of 95 pieces and compliance with this order would require the employment of 190 musicians to needlessly duplicate and embarrass the work of one orchestra.

A circumstance that gave impetus to this legislation was an edict directed at a music school in Michigan, which prohibited a broadcast by a school orchestra unless a tribute of three times the usual price of an orchestra of the federation was paid for that privilege. The Vandenberg bill which passed the Senate and the Dondero bill introduced in the House were outgrowths of that circumstance.

CONCLUSION

The coercive character of the methods followed in the name of the American Federation of Musicians is attested by the indisputable fact of the millions of dollars mulcted from the broadcasting industry in recent years. Time after time broadcasters have paid tribute, and otherwise acceded, to these extortionate demands rather than suffer the greater hardships and losses that refusal to comply would involve. These tributes and other exactions were not payments for services or to satisfy an obligation owed to those who demanded them. They were the price paid for the peace of being relieved from the penalties of refusal. As a reward the broadcasting industry has been confronted with more and greater demands of equal viciousness.

It is the responsibility of the Congress to take effective action to stem the rising tide of unconscionable demands upon the broadcasting industry, against which, in the present state of the law, that industry is powerless to defend itself. To the end of meeting that responsibility, prompt enactment into law of the bill here reported is strongly recommended.

EXPLANATION OF THE PROVISIONS OF THE BILL BY SUBSECTIONS

The bill proposes to add to title V of the Communications Act of 1934 a new section 506, containing subsections (a) to (e), inclusive.

SUBSECTION (A)

This subsection makes it unlawful to coerce, compel, or constrain (or to attempt to coerce, com-

pel, or constrain) any radio-station licensee to do any one or more of the things specified in paragraphs (1) to (6), inclusive, of the subsection, whether such actual or attempted coercion, compulsion, or constraint is exerted by the use, or threat of the use, of force, violence, intimidation, or duress, or whether it is exerted by the use, or threat of the use, of any other means (whether or not of the same character as force, violence, intimidation, or duress).

It has been necessary to use the broad language "or by the use or express or implied threat of the use of other means" in order to make the legislation effective. It was necessary to use language broad enough to embrace actual or threatened boycotts and actual or threatened strikes, because these, as well as action or threatened action of like character, could well be among the means by which the coercion, compulsion, or constraint prohibited by the bill may be accomplished or attempted to be accomplished. If the language were not this broad the legislation would fail to accomplish its purpose.

This subsection does not prohibit the right to strike or to withhold services, or force individuals to work against their will or desire. It will place no limitation whatever on the use of strikes for the accomplishment of legitimate objectives, such as wage increases or better working conditions. The subsection does not prohibit strikes *as such*. What it does do is to prohibit the accomplishment, by actual or attempted coercion, compulsion, or constraint, of certain unconscionable and wrong-

ful objectives, regardless of the means used. A strike or threat of a strike is one method by which it is possible to exert or attempt to exert such coercion, compulsion or constraint, and, if it is the method used, the wrongful character of the offense is the same as though other means had been used.

The acts or things specified in paragraphs (1) to (6), inclusive, which it is made unlawful to coerce, compel or constrain, or attempt to coerce, compel or constrain, a licensee to do, are as follows:

> (1) To employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees wanted by such licensee; or
>
> (2) To pay or give or agree to pay or give any money or other thing of value in lieu of giving, or on account of failure to give, employment to any person or persons, in connection with the conduct of the broadcasting business of such licensee, in excess of the number of employees wanted by such licensee; or
>
> (3) To pay or agree to pay more than once for services performed in connection with the conduct of the broadcasting business of such licensee; or
>
> (4) To pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensee, which are not to be performed; or
>
> (5) To refrain, or agree to refrain, from broadcasting or from permitting the broad-

casting of a noncommercial educational or cultural program in connection with which the participants receive no money or other thing of value for their services, other than their actual expenses, and such licensee neither pays nor gives any money or other thing of value for the privilege of broadcasting such program nor receives any money or other thing of value on account of the broadcasting of such program; or

(6) To refrain, or agree to refrain, from broadcasting or permitting the broadcasting of any radio communication originating outside the United States.

SUBSECTION (B)

This subsection makes it unlawful to coerce, compel, or constrain (or to attempt to coerce, compel or constrain) any radio-station licensee, or any other person, to do any one or more of the things specified in paragraphs (1) to (3), inclusive, of the subsection, whether such actual or attempted coercion, compulsion, or constraint is exerted by the use, or threat of the use, of force, violence, intimidation, or duress, or whether it is exerted by the use, or threat of the use, of any other means (whether or not of the character as force, violence, intimidation, or duress).

It will be noted that subsection (a), discussed above, applies only in the case of actual or attempted coercion, compulsion, or constraint upon a licensee. Because of the nature of the acts or things referred to in paragraphs (1) to (3) inclusive, of this subsection, however it has been necessary to make this subsection applicable to

actual or attempted coercion, compulsion, or constraint upon a licensee or upon any other person, but the acts or things set forth in paragraphs (1) to (3), inclusive, all have a direct relationship to radio broadcasting.

What has been said above in the discussion of subsection (a) with regard to the language "or by the use or express or implied threat of the use of other means" is equally applicable in the case of this subsection.

The things specified in paragraphs (1) to (3), inclusive, of this subsection, which it is made unlawful to coerce, compel, or constrain, or attempt to coerce, compel, or constrain, a licensee or any other person to do, are as follows:

(1) To pay or agree to pay tribute for the privilege of, or on account of, producing, preparing, manufacturing, selling, buying, renting, operating, using, or maintaining recordings, transcriptions, or mechanical, chemical, or electrical reproductions, or any other articles, equipment, machines, or materials, used or intended to be used in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or

(2) To accede to or impose any restriction upon such production, preparation, manufacture, sale, purchase, rental, operation, use, or maintenance, if such restriction is for the purpose of preventing or limiting the use of such articles, equipment, machines, or materials in broadcasting; or

(3) To pay or agree to pay tribute on account of the broadcasting, by means of

recordings or transcriptions, of a program previously broadcast, payment having been made, or agreed to be made, for the services actually rendered in the performance of such program.

SUBSECTION (C)

It is provided by this subsection that the provisions of subsection (a) or (b) shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right or legal obligation.

SUBSECTION (D)

This subsection, as proposed to be amended by the committee, provides that whoever willfully violates any provision of subsection (a) or (b) shall upon conviction thereof be punished by imprisonment for not more than 1 year or by a fine of not more than $1,000, or both, thus making the offense a misdemeanor. In the bill as introduced the offense would have been a felony and punishment would have been by imprisonment for not more than 2 years or by a fine of not more than $5,000, or both.

SUBSECTION (E)

This subsection contains provisions to insure that the term "licensee," as used in the proposed new section 506, includes the owner or owners, and the person or persons having control or management, of the radio station in respect of which a station license has been granted.

CHANGES IN EXISTING LAW

In compliance with paragraph 2a of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (new matter is printed in italics, existing law in which no change is proposed is shown in roman):

[Omitted.]

U. S. GOVERNMENT PRINTING OFFICE : 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 954

UNITED STATES OF AMERICA,

Appellant,

v.

JAMES C. PETRILLO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR JAMES C. PETRILLO

JOSEPH A. PADWAY,
HENRY KAISER,
HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.
HENRY A. FRIEDMAN,
521 Fifth Avenue,
New York, New York.
DAVID KATZ,
175 West Washington Street,
Chicago, Illinois,

Counsel for Appellee.

INDEX

Subject Index

	Page
Brief for James C. Petrillo	1
The opinion of the court below	1
Statement as to jurisdiction	1
Summary of argument	1
Opening statement	5
Argument	
Analysis of statute	12
A. The statute outlaws the simple strike, the peaceful picket, and all other "means" to achieve objectives which the statute itself expressly legitimates	12
B. Congressional debates	15
C. Errors in appellants's approach to the statute and to the issues in this case	24
1. The statute does not deal with monopolies in the radio broadcasting industry	24
2. The statute does not outlaw objectives	28
The statute abridges freedom of speech in violation of the First Amendment	36
A. Peaceful picketing that threatens economic injury is within the protection of the First Amendment	36
B. The statute's proscription of speech does not meet the clear and present danger test	44
The statute is contrary to the Thirteenth Amendment	48
The statute is repugnant to the due process clause of the Fifth Amendment	52
A. The phrase "Number of Employees Needed by Such Licensee" is vague, indefinite and uncertain	52

Page

B. Equal protection of the laws ... 61
C. The statute destroys the right to bargain collectively, which is a "Liberty" within the meaning of the Fifth Amendment ... 66
Conclusion ... 70

Appendix A ... 73
Appendix B ... 80
Appendix C—Why foreign broadcasts must be regulated ... 84
Appendix D ... 87

TABLE OF CASES CITED

American Federation of Labor v. *Reilly*, 7 Labor Cases, 65 ... 69
American Federation of Labor v. *Swing*, 312 U. S. 321 ... 3
American Foundries v. *Tri-City Council*, 257 U. S. 184, 205, 207 ... 32
Bailey v. *Alabama*, 219 U. S. 219 ... 50
Bakery & Pastry Drivers v. *Wohl*, 315 U. S. 760 ... 3, 31
Big Lake Oil Co. v. *National Labor Relations Board*, 146 Fed. (2d) 967 ... 43
Bridges v. *California*, 314 U. S. 252 ... 3
Cafeteria Employees' Union v. *Angelos*, 320 U. S. 293 ... 3
Carlson v. *California*, 310 U. S. 106 ... 34
Cantwell v. *Connecticut*, 310 U. S. 296 ... 3
Cline v. *Frink Dairy Co.*, 274 U. S. 445 ... 54
Collins v. *Kentucky*, 234 U. S. 634 ... 54
Coppage v. *Kansas*, 236 U. S. 1, 27 ... 66
Dorchy v. *Kansas*, 272 U. S. 306 ... 30
Edward G. Budd Manufacturing Co. v. *National Labor Relations Board*, 142 Fed. (2d) 922 ... 43
Franklin Union v. *People*, 220 Ill. 355, 77 N. E. 176 ... 32
Glass Co. v. *Glass Blowers*, 77 N. J. Eq. 219, 79 Atl. 262 ... 32
Gompers v. *United States*, 233 U. S. 604, 610 ... 66
Gorin v. *United States*, 312 U. S. 19 ... 60
Henderson v. *Coleman*, 7 Sou. (2) 117 (Fla.) ... 49

	Page
Herndon v. *Lowry*, 301 U. S. 242, 258	46
Hiroboyashi v. *United States*, 320 U. S. 81, 100	61
In re Langell, 178 Mich. 305, 144 N. W. 841	32
In re Porterfield, 28 A. C. 102 (Calif.)	19
International Harvester Company v. *Kentucky*, 234 U. S. 216, 221	54
Kolley v. *Robinson*, 187 Fed. 415	32
Lanzetta v. *New Jersey*, 306 U. S. 451	53
May Department Store Co. v. *National Labor Relations Board*, 326 U. S. 376	41
Metropolitan Casualty Insurance Co. v. *Brownell*, 294 U. S. 580, 584	61
Midland Steel Products Co. v. *National Labor Relations Board*, 113 Fed. (2d) 800, 804	43
Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U. S. 287, 293	33
National Labor Relations Board v. *Virginia Electric & Power Company*, 314 U. S. 469	41
National Labor Relations Board v. *Ford Motor Co.*, 114 Fed. (2) 905, 913; certiorari denied, 312 U. S. 689	42
National Labor Relations Board v. *American Tube Bending Co.*, 134 Fed. (2d) 993; certiorari denied, 320 U. S. 768	43
National Labor Relations Board v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 33	66
Overnight Motor Transportation Company 316 U. S. 572	11
Opera on Tour v. *Weber*, 285 N. Y. 348	31
O'Neil v. *Behanna*, 182 Pa. 236, 37 Atl. 843	32
Otis Steel Co. v. *Molders*, 110 Fed. 698	32
Peter J. Schweitzer, Inc. v. *National Labor Relations Board*, 144 Fed. (2d) 520	43
Pierce v. *Stablemen's Union*, 156 Ca. 70, 103 Pac. 224	32
Pollock v. *Williams*, 322 U. S. 4, 18	49
Senn v. *Tile Layers' Protective Union*, 222 Wis. 383, 268 N. W. 270	37
Schneider v. *State*, 308 U. S. 147, 161	44
Schenk v. *United States*, 249 U. S. 47, 52	46

Page

Screws v. *United States*, 325 U. S. 91 4
Stapleton v. *Mitchell*, 60 F. Supp. 61 48
St. Germain v. *Bakery Workers*, 97 Wash. 282, 166 Pac. 665 32
Texas & New Orleans R. Co. v. *Brotherhood of Railway Clerks*, 281 U. S. 548 50
Thornhill v. *Alabama*, 310 U. S. 88 3
United States v. *American Federation of Musicians*, 47 F. Supp. 304, affirmed, 318 U. S. 741 11
United States v. *Carrozzo*, 37 F. Supp. 191; affirmed, 313 U. S. 539 11
United States v. *Cohen Grocery*, 255 U. S. 81 53
United States v. *Local 807*, 315 U. S. 521, 532 57
United States v. *Ragen*, 314 U. S. 513 59
United States v. *United Mine Workers of America*, Nos. 759-760, decided March 6, 1947 51
Vegelahn v. *Guntner*, 167 Mass. 92 31
Vonnegut Machinery Co. v. *Toledo Machine & Tool Co.*, 263 Fed. 192 32
Weeds v. *United States*, 255 U. S. 109 54
West Virginia v. *Barnette*, 319 U. S. 624 45

STATUTES CITED

Criminal Appeals Act, as amended May 9, 1942, 56 Stat. 271, 18 U. S. C. Sec. 682 1
Thirteenth Amendment 3
Section 506(a)(1) 3
House Report 1508, 79th Cong., 2nd Sess., p. 6 5
Report No. 1508, supra, p. 5 7
"Proceedings of the 62nd Annual Convention of the American Federation of Labor", pp. 402-404 7
Amusement Industry, Monthly Labor Review, August, 1931, pp. 261-267 8
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Public Papers and Addresses of Franklin D. Roosevelt, Vol. II, pp. 202, 204 10
Hearings on Senate 158 and H. R. 4557, 73rd Cong., 1st Sess., April 25, 1933, p. 1 10

	Page
82 Congressional Record, p. 1696	11
House Report No. 1452, 75th Cong., 1st Sess., pp. 7 and 9	11
The Internal Affairs of Associations, 43 Harvard Law Rev. 993, 1014, et seq.	26
Truman Committee, 3rd Annual Report, 78th Congress, 2d Session, Report 10, Part 16, March 4, 1944, p. 25	29
Baruch Report on West Coast Air Craft Manpower Problems August 19, 1943, *New York Times*, September 17, 1943; *New York Times*, January 12, 1943, p. 14	29
Labor in The Courts, 39 Yale Law Journal, 682, 697	31
Landis & Manoff, Cases on Labor Law, Chapter, I, Second ed.	31
Frankfurter & Green, *The Labor Injunction*, p. 31	37
Section 2 of the Norris-LaGuardia Act, 29 U. S. C. A., Chap. 6	70
Section 1 of the National Labor Relations Act (49 Stat. 449)	70

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 954

UNITED STATES OF AMERICA,

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JAMES C. PETRILLO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR JAMES C. PETRILLO

THE OPINION OF THE COURT BELOW

The opinion of the District Court (R. 3) is reported in 68 F. Supp. 845.

STATEMENT AS TO JURISDICTION

This Court has jurisdiction under the Criminal Appeals Act, as amended May 9, 1942, 56 Stat. 271, 18 U. S. C. Sec. 682.

SUMMARY OF ARGUMENT

I

The statute outlaws the simple strike and peaceful picketing as well as all other "means"—no matter what their constitutional stature and protection—which may be used

to effect certain conditions which Congress, in the same statute, recognizes as legitimate. Subsection (c) expressly renders valid agreements embodying the conditions set forth in subsections (a) and (b), and nothing in the statute prevents a licensee from unilaterally imposing those conditions. Prohibited only are all means, including those peacefully and traditionally used by workers, to obtain those lawful agreements. Such a statute is patently unjust and unconstitutional.

The Congressional debates reflect the insupportability of the statute. Some proponents of the bill completely avoided any frank discussion of its provisions but sought, instead, unfairly and irrelevantly to denigrate the character of the President of the American Federation of Musicians. Others were compelled by the illogic of their position to obvious evasion and self-contradiction. The debates show clearly that the lawmakers themselves could not interpret the statute so as to avoid repugnance to the Constitution.

Appellant argues at great length to show that Congress has power to outlaw labor monopolies. But the provisions of the statute, from its title to its conclusion, have nothing whatever to do with monopolies. Actually, the statute would apply to a single, non-union, unemployed person who pickets a licensee who refuses to employ him on the ground that he was not "needed." The alien issue of monopolies is introduced as a springboard from which to launch lengthy attacks upon the practices of the defendant and of the American Federation of Musicians—attacks which are wholly unwarranted by the facts and which, in any event, are irrelevant to the issues in this case. The claim that Congress sought to protect commerce from certain restraints of trade, although Congress expressly authorized binding agreements embodying those alleged restraints, is, we submit, absurd.

Appellant also argues that the statute must be narrowly applied to the facts alleged in the information. This argu-

ment concedes by necessary implication that the statute is not narrowly drawn and that its terms proscribe the exercise of civil liberties by persons other than defendant. The rule consistently followed by this Court is that a statute abridging freedom of speech must be tested on its face. See, for example, *Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Bridges* v. *California*, 314 U. S. 252.

II

The First Amendment protects the right to publicize the facts of a labor dispute with a private employer by a peaceful picket that threatens economic injury. *Thornhill* v. *Alabama, supra; American Federation of Labor* v. *Swing*, 312 U. S. 321; *Cafeteria Employees' Union* v. *Angelos*, 320 U. S. 293; *Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 760. Here, there is no "clear and present danger" of any conceivable "evil" since the objective of the picketing has been affirmatively approved by Congress.

III

The right to refuse to work for the private gain of another enjoys the same constitutional protection as does all basic civil liberties. Since the instant statute abridges that right in the absence of imminent danger of any evil it must fall. This is the first enactment by any legislature, since the adoption of the Thirteenth Amendment, which compels a single individual to work for a private person against his will. A statute which criminally punishes peaceful individual or concerted refusal to work for the private profit of others directly violates the Thirteenth Amendment.

IV

A. Section 506(a) (1) is repugnant to the due process clause of the Fifth Amendment because it defines a new crime in such uncertain terms that persons of ordinary

intelligence cannot know in advance whether their conduct is within the prohibition of the statute. The phrase "number of employees needed by such licensee" is of vague, indefinite and uncertain meaning. The criteria which determine the number employed for any given job (such as the financial resources of the employer, the complexity of the task, the desire and quality of the product, the skill of those who manage and those who labor, and a host of others) are so manifestly abstract and varied as to render impossible their condensation into any standard of conduct sufficiently clear and instructive to meet the rule against vagueness. Nor can the requirement of willfulness save an otherwise indefinite statute. *Screws* v. *United States*, 325 U. S. 91.

B. Due process precludes arbitrary classification. To permit licensees to impose conditions which are claimed to be evil, and at the same time to prohibit employees from merely seeking to establish the same conditions, is discriminatory and indefensible. The evil lies in what is done and not in who has done it. There is further discrimination as between employees in the radio broadcasting industry and employees in all other industries. The latter fully enjoy and exercise the right, by peaceful methods, to pursue the objectives which radio broadcasting employees may not. To single out for criminal punishment one segment of one industry for practices common to all segments of that industry and to all segments of all industries is to violate due process.

C. The statute destroys the right to bargain collectively which is a "liberty" within the meaning of the Fifth Amendment. The only bargaining power possessed by employees is that of refusing their collective labor, and this the statute prohibits. Legislative and judicial authorities recognize that only by collective action can employees enjoy liberty of contract. Collective bargaining, if it is to mean anything, must include the right to collective with-

drawal from work. By removing that right the statute destroys what has been held to be a "fundamental" right and, therefore, violates the Fifth Amendment.

OPENING STATEMENT

The provisions of Section 506, title V of the Communications Act of 1934, as amended (hereinafter referred to as "the statute"), its legislative history and even its popular designation ("Anti-Petrillo law") show its emotional and irrational content. The statute does not lay down anything like a consistent or comprehensible national policy on labor relations in the radio broadcasting industry. It is, rather, an expression of unrestrained vindictiveness, as witness the vituperative attacks with which the Report[1] and debates abound. Congressional discussion even sank to the low level of making derisive sport of appellee's proper name.

This unreasoned, bitter assault upon a labor organization of some 200,000 citizens can be explained only as the expression of an enraged prejudice that has been carefully nurtured and spread by the owners of the broadcasting industry whose inordinate profits were threatened with some reduction by the normal demands and activities of those whose training, skill and energy substantially contributed to the success of that industry.

These owners, banded together in a powerful national association, with virtually unlimited funds and with direct control over and access to the nation's radios and newspapers, the major avenues of public communication, were firmly resolved to smash the Musicians' Union for the simple reason that it, like any other union worthy of the name, was vigorously attempting to preserve and extend the economic welfare of its members.

The method they adopted was an elaborate propaganda campaign of abuse and vilification designed to inflame the

[1] House Report 1508, 79th Cong., 2nd Sess., p. 6.

people and the Congress of the United States and thereby enlist the sovereign power of our national government in support of their efforts to perpetuate their dominant economic position. The law approved on April 16, 1946, eloquently attests to the complete success of their well-laid plans and energetic efforts.

Let one of their own members describe their plans and tactics. On October 19, 1942, Mr. Samuel Rosenbaum, the President of Station WFIL, publicly issued a statement[2] he had made to a district meeting of the National Association of Broadcasters, in which he said:

> "We have engaged counsel to master-mind the campaign and we have hired a high-pressure publicity firm which is inspiring the national flood of news stories, editorials and cartoons against Petrillo.
>
> . . . . . .
>
> "We are allowing our name to be seriously damaged by letting it be used in a form of labor-baiting and labor-leader smearing which is a relic of a past generation . . . Billingsgate, bilge and bluff are no longer successful weapons in a labor negotiation.
>
> "With the entire press of the United States at our disposal, and with powerful branches of Government lending themselves amiably to the effort, all we have been able to think of is to attack the integrity and personal characteristics of one labor leader who happens to be a vigorous and outspoken agent of his craft.
>
> . . . . . .
>
> "There are deep-lying economic difficulties to be met in this controversy. What have we contributed toward their solution . . .? Not one constructive thought has been uttered. All our energy has been concentrated to organize a legal and newspaper hue-and-cry. The only remedy we have proposed is the old reactionary slogan, 'Keep everything as is.'"

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[2] Republished in the October 26, 1942 issue of the trade magazine *Broadcasting*, p. 60.

Far from doing a "disservice"[3] to other labor unions,[4] far from acting "outrageously"[5] or arbitrarily, the American Federation of Musicians has been in the forefront of a social and economic contest whose outcome is vital to trade unionism. The "weapons" it has employed have always and ever been the completely peaceful ones of refusal to work, non-violent picketing, and verbal appeals to its fellow unionists and to its other friends.

The specific union activities which the statute proscribes are all addressed to the same end, namely, the enhancement of professional musicians' employment opportunities. Thus, the first four subsections of Section 506 (a) deal with direct attempts to increase employment. Subsections (5) and (6) deal with the effort to preserve jobs against the less expensive competition of amateurs and foreigners respectively. Section 506 (b) deals with the attempt on the part of employees to resist the destructive competition of mechanical devices which they, themselves, make.

A fundamental reason for the formation of labor organizations is the need and the desire on the part of workers, helpless as individuals, to obtain employment and to protect employment already obtained. Without employed membership the Musicians' Union, or any other union, would, of course, cease to exist. Collective bargaining, which is the declared policy of our Government, necessarily presupposes employment.

The American Federation of Musicians is, because of the circumstances in the industries in which its members work, peculiarly sensitive to abiding threats of unemployment. More than any other craftsmen in our economy are

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[3] Report No. 1508, *supra*, p. 5.

[4] The complete support given the Musicians by the American Federation of Labor is evidenced by the action taken at its 1942 Convention, which is set forth in Appendix D, "Proceedings of the 62nd Annual Convention of the American Federation of Labor", pp. 402-404.

[5] Report No. 1508, *supra*, p. 6.

they subject to loss of jobs as a result of competition by machine and by less expensive labor.

A striking illustration of the dangers to which professional musicians are exposed was the advent of the sound motion picture. In 1928 and 1929—the first two years of the rapid growth of sound pictures—approximately 10,000 theatre musicians lost their jobs.[6] This dreadful condition was aggravated by the closing of many theatrical houses and legitimate theatres throughout the country. As a result, instead of 22,000 musicians employed in theatres in 1927 there are only some 4,000 so employed today. It is instances such as these and the daily threat of their recurrence (and not, as some would have us believe, the dictation of a self-willed labor leader) that have compelled the professional musicians of this country to join together and take measures in self-defense.

Can anyone, living in a society in which near full employment is obtained only in times of war, and in which from three to ten million workers are chronically unemployed, reasonably say that the attempts of employees to join together for the mutual protection of their jobs involve "moral turpitude"?[7] On the contrary, "may not all with a common interest join in refusing to expend their labor on articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports them?" (Mr. Justice Brandeis in *Duplex* v. *Deering*, 254 U. S. 443, 481.)

The statute would stultify the obvious realities of contemporary industrial life, realities that have shaped the underlying labor policies of the Federal Government for many years.

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[6] Effects of Technological Changes Upon Employment in the Amusement Industry, Monthly Labor Review, August, 1931, pp. 261-267. See also, Effects of Technological Changes Upon Employment in The Motion Picture Theaters in Washington, D. C., Monthly Labor Review, November, 1931, pp. 1005-1008.

[7] House Report No. 1508, *supra*, p. 4.

Some forty years ago a Congressional Committee, investigating the problem of machine displacement of labor, reported:

> ". . . *the only way in which the workmen* in a particular trade can, by their own action, *avoid the immediate hardship that results from improvements of machinery* and methods in their own craft *seems to be by united action taken through some such organization as a trade union.* It is believed to be impossible to point out any instance in which unorganized workmen have received any immediate and visible benefit from the introduction of new machinery in their trade." (Italics supplied.)[8]

The underlying policy of the labor and social legislation of the last fifteen years was to create employment opportunities and to adopt other means that would minimize unemployment. Several efforts were made during the Hoover administration to meet the problem of unemployment, such as the President's Emergency Committee for Employment, the Employment Stabilization Act of 1931, the Emergency Relief Construction Act of 1932, and the attempted passage of the 30-hour bill in December of 1932. These efforts, however, failed to stem the rise of unemployment.

We shall not attempt here to go into the detailed history of the extensive legislation of the Roosevelt administration[9] to provide for increased employment opportunities.

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[8] Final Report of the Industrial Commission, House Document No. 380, 57th Cong., 1st Sess., pp. 822, 824, 825.

[9] The present administration has adopted the same policy. In his message to the Nation on November 3, 1946, describing the administration's post-war legislative program, President Truman said: "Unless we can soon meet the need of obtaining full . . . employment at home we shall face serious consequences." "Our primary aim is to bring about steady, well-paid jobs and purchasing power." "One essential part of our program, designed not only to tide us over the reconversion period but also to carry us to our goal of full production and a higher standard of living, is the adoption of full employment legislation." (Chicago Sun, January 4, 1946, p. 7.)

A few illustrations will suffice. In one of his first messages to Congress, President Roosevelt recommended the passage of legislation to provide "for the machinery necessary for a great cooperative movement throughout all industries to obtain wide re-employment . . ."[10] It was his purpose, he said, "to increase and to 'spread' work."[11]

The 30-hour week bill which was re-introduced in the 73rd Congress had for its basic purpose, according to the statement of the Secretary of Labor at the opening of the hearings, to "increase work and to increase the number of people who are earning money."[12]

The National Industrial Recovery Act was given precedence over the 30-hour week bill and was approved by the President on July 16, 1933. The NIRA declared it to be the public policy to reduce and relieve unemployment. President Roosevelt when signing the bill stated that the act was passed "to put men to work."[13]

The President's re-employment agreement of July 27, 1933, sought to give substance to Section 4 (a) of the Recovery Act which had as its purpose "the reemployment program in order to get as many unemployed back to work as quickly as possible." A report on the operations of the NIRA, which was submitted by the President to Congress on March 2, 1937, stated that the number one economic policy was the spreading of work.[14]

That the desire to create and spread employment was a basic purpose of the Fair Labor Standards Act is clearly indicated by the Chairman of the House Committee on Labor who stated "that is the purpose of the bill—to try

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[10] Message to Congress dated May 17, 1933, *Public Papers and Addresses of Franklin D. Roosevelt*, Vol. II, pp. 202, 204.

[11] Id. at pp. 204-205.

[12] Hearings on Senate 158 and H. R. 4557, 73rd Cong., 1st Sess., April 25, 1933, p. 1.

[13] *Public Papers, supra*, pp. 22, 251-256.

[14] House Document No. 158, 75th Cong., 1st Sess. Report on the Operation of the NIRA.

to spread employment."[15] The debates in the House, as well as the House Report, show the fundamental intent of the bill to enlarge job possibilities.[16] See *Overnight Motor Transportation Company*, 316 U. S. 572. See also *United States* v. *American Federation of Musicians*, 47 F. Supp. 304, affirmed, 318 U. S. 741, and *United States* v. *Carrozzo*, 37 F. Supp. 191, affirmed, 313 U. S. 539.

Thus, we see that there is no validity whatever in the assertions on the part of the supporters of the Lea Bill that defendant or any group of employees in the radio broadcasting industry had been engaging in evil practices. All they have done is to engage in controversies that are as old and familiar as the employer-employee relationship itself. These controversies are all aspects of the basic issue that exists the world over—the desire and effort on the part of owners and employers to obtain and maintain the widest possible margin of profit and the conflicting desire of employees to obtain and maintain the widest possible margin of security and gainful employment.

The contest in the radio broadcasting industry is particularly acute because the musician employees are peculiarly subject to displacement by the machines they make, because the industry is new (with little experience in the statesmanship of collective bargaining) and has made gigantic strides and profits in remarkably short time, and because added to the economic power of the industry is its strategic power to publicize and propagandize its own views and interests, a power greatly enhanced by the circumstance that many broadcasting stations are owned and controlled by newspapers. Making full and effective use of its extraordinary powers, the radio broadcasting industry has succeeded in unfairly weighting the issue in its favor by receiving the aid of our Government in the form

[15] 89 Congressional Record, p. 1696.

[16] House Report No. 1452, 75th Cong., 1st Sess., pp. 7 and 9.

of the Lea Act. We assert that the aid thus given is repugnant to the Constitution of the United States.

ARGUMENT

I

ANALYSIS OF STATUTE

A. The Statute Outlaws The Simple Strike, The Peaceful Picket, and All Other "Means" to Achieve Objectives Which The Statute Itself Expressly Legitimates.

Most of the constitutional deficiencies of the statute grow out of the crucial fact that it prohibits all "means," no matter what their constitutional stature or protection, that may be employed to effectuate conditions that Congress, in the same statute, proclaimed lawful and permissible. It is, we submit, because of the patent unconstitutionality of such a statute that strenuous efforts have been made throughout the legislative and judicial consideration of this statute to obscure that crucial fact by the convenient but misleading device of resorting to conclusionary and descriptive language that totally repudiates the plain meaning of the actual provisions of the statute.

Thus, we are told that the statute "will place no limitation whatever on the use of strikes for the accomplishment of legitimate objectives," that it will only prohibit the accomplishment of "wrongful objectives."[17] But when we examine the statute itself we readily see how extravagantly erroneous those statements are.

Every one of the seven objectives set forth in subsections (a) and (b) of Section 506 are pronounced valid and permissible by subsection (c). Those seven objectives are:

1. The employment by a licensee of more persons than needed to perform actual service;
2. The making of payments in lieu of such employment;

[17] Report No. 1508, *supra*, p. 6.

3. The payment more than once for services rendered;

4. The payment of compenstaion for serviges not performed;

5. The refraining from broadcasting non-commercial educational or cultural programs;

6. The refraining from broadcasting foreign programs;

7. The payment of any "exaction" for the production and distribution of transcriptions and the levying of additional "exactions" for the commercial use of recordings for which payment has been made. (This last objective involves the principle embodied in some five hundred existing agreements between record manufacturers and users to pay a nominal royalty per record to an "employment fund" to create work for musicians who are displaced by the use of mechanical devices which they themselves make.)

As to those objectives, subsection (c) provides:

> "The provisions of subsection (a) or (b) of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed."

Plainly, therefore, any licensee may sign an agreement with any employee or group of employees or their bargaining representative encompassing all of the conditions set forth above. Indeed, as we shall hereafter show, any licensee may unilaterally impose those conditions against the express request of its employees. Therein lies the inherent injustice of the statute.

Consider, for example, the question of foreign broadcasts. Any licensee may conclude that it is to his best economic interest to refrain from broadcasting programs originating outside of the United States. The licensee is under no obligation to ask anyone concerning his right to refuse to broadcast such foreign programs; his own decision and

action are final and end the matter. He has committed no crime, he has done no wrong, he has violated no statute. But he has, absolutely and most effectively, prevented the broadcast of foreign programs.

Clearly, then, Congress has not declared that the absence of foreign broadcasts, or that any of the other conditions set forth in subsections (a) and (b), are undesirable or unlawful. On the contrary, by subsection (c) Congress has affirmatively endorsed and protected those conditions. All Congress has done is to prohibit the exercise of fundamental constitutional rights as a means of attaining the very conditions it has preserved and encouraged by this statute.

It is well at this point to emphasize how crudely and even fantastically unfair the statute is in its actual design and operation. A union or other representative of the employees of the licensee may, under this statute, make a request for one of the conditions listed in subsections (a) and (b), and the licensee may grant the request and incorporate it into a binding, enforceable agreement. But the union or representative dare not go beyond a request. Should the licensee, no matter how arbitrarily, reject the request, then the hands of its employees are completely tied. The employees must abjectly accept the arbitrary decision and refrain from any efforts in furtherance of their request, for to proceed will constitute criminal conduct subject to fines and imprisonment.

What system of logic, law or morality can rationalize a statute that permits a licensee whimsically to discharge 75 employees whom he declares unnecessary, but would imprison the remaining 25 employees should they, by peaceful picket, resist and publicize their employer's action? What possible justification is there for any statute which brands criminal the mere attempts of workers to secure the very conditions that the employer may directly impose with complete impunity? If, as the sponsors of this statute contend, the conditions listed in subsections (a) and (b) constitute evils, then why, in simple decency, did they not

outlaw those conditions? Can anyone seriously argue that the commerce of radio broadcasting or the welfare of the public is more seriously jeopardized where musicians object to the cheaper competition of foreign programs [18] than where licensees, for capricious reasons, cut out foreign broadcasts? If it is wrong to deny the public the pleasure of non-commercial educational and cultural programs, then why did not Congress make it unlawful for all persons, licensees as well as employees, to prevent the broadcast of such programs? If it be evil to pay a small sum of money per record into an "employment fund," then why did not Congress outlaw those funds and prohibit any person from creating them?

The flagrantly one-sided approach of the statute is, we submit, explicable only in terms of a deliberate intention on the part of its sponsors to enlarge the prerogatives of the licensees and thereby enhance their profits. It was fully realized that flatly to outlaw the conditions or objectives set forth in subsections (a) and (b) would greatly prejudice the economic interests of licensees. The only way of achieving the dual aim of retaining and increasing the economic advantages of the employers and of diminishing and destroying the bargaining power of the workers was by legitimating the conditions listed in subsections (a) and (b) and outlawing only the means which employees have traditionally used in quest of any conditions.

B. *Congressional Debates*

There can be no more graphic illustration of the pervasive inequity of the statute than the quality and content of the Congressional debates. They are replete with extraordinary mental gymnastics performed by the managers and other proponents of the bill with obvious eva-

[18] See "Why Foreign Broadcasts Must Be Regulated," March, 1946, issue of the *International Musician*, set forth herein as Appendix C.

sions and crude contradictions which the basic illogic of their position forced upon them.

It may be fairly said of the debate in the House that, generally, those who supported the bill were far more determined unfairly to vent their spleen on Mr. Petrillo than to enact a consistent or constitutional law. The arguments and statements of the opponents of the measure, to which we fully subscribe, were not met on any rational basis for the simple reason that they could not be so met.

Congressman Marcantonio, in vigorous opposition to the bill, realistically pointed to the true aim and effect of the statute:[19]

> ". . . This bill is brought here behind a smoke screen of indignation against the activities of Mr. Petrillo . . . Just what does it do to organized labor in the broadcasting industry?
>
> "An analysis of this bill—a cold-blooded analysis of this bill demonstrates . . . it goes further than any other bill that the Congress has ever had before it with respect to the right to strike. This is the first time that we have before us a bill which calls for imprisonment in the event that American workers go out on strike . . . Under this bill, if the American musicians refuse to work because of the broadcasting company refusing to accede to their demands, they may be prosecuted and sent to jail. You cannot get away from that, and no amount of blanket denial will contradict it."
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> . . . . . .
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> ". . . They speak about the immorality of Petrillo's actions. I just wonder how moral it is to fix a labor policy in this industry which takes money out of the pockets of workers and puts it into the pockets of broadcasting companies. Read the bill. It is a bill to increase the profits of broadcasting monopolies at the expense of workers and not a bill to protect children's orchestras, as its proponents would have us believe."

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[19] 92 Cong. Rec. 1545-6.

Thereafter, Congressman Marcantonio offered an amendment to strike out the language "or by the use or express or implied threat of the use of other means." This amendment was, of course, calculated to permit peaceful striking, picketing and similar means for lawful objectives. In support of that proposal he said (id. at p. 1559):

> ". . . You are legislating imprisonment for men refusing to work. It is clearly in violation of the thirteenth amendment; it is unconstitutional; but if Congress wants to do it, if instead of discussing the bill you prefer to keep up to the pattern that has been set here of raising smoke screens, of waving the flag, of talking about Union men that are buried and Confederate men that are buried, of condemning Caesar and defending the shrine, go ahead and lynch organized labor and enjoy it while you are doing the job."

Congressman Rabin emphasized the unconstitutionality of prohibiting a strike for ends that are admittedly lawful:

> "I agree with the gentleman from Indiana (Mr. Halleck), except I will go further: I do not have any doubt about this bill being unconstitutional. What does this bill do? Does it make certain practices a crime and does it provide that you may not strike to achieve those ends? It does not do that. It makes the very act of striking a crime, because if you will read with me on page 1, it provides:
>
> . . . . . .
>
> "'It shall be unlawful . . . by the use of other means—'
>
> "And that refers to strikes. It shall be unlawful by the use of a strike to do certain things. Without a strike it is lawful to do those things under the terms of this bill. The union may sit around the table now and agree to receive a fraction of a cent per recording. It will be able to do that should this bill be passed.
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> "What then do you do by this bill? You say if it attempts to strike to accomplish that end, then it shall be unlawful . . . It makes the very act of striking a crime, and that is why I am opposed to this bill. What

else does this bill do? As I read it, it places in jeopardy the royalty of radio artists, because if a radio station broadcasts a program and that is transcribed, no royalty may be demanded under the threat of strike. But they could be paid if they sat around the table and worked out an arrangement for payment. If a broadcasting station refuses to pay them, and these radio artists get together and demand that it be done under the threat of a strike, then it becomes unlawful for them even to ask for royalties." [20]

Particularly significant was the amendment proffered by Mr. Rabin and the action taken thereon by the House. He suggested the addition of the following language: "Nothing herein contained shall prohibit the right to strike for any objective which may be lawfully obtained through negotiations."

This put the issue squarely before the House—the issue of whether or not men may strike or picket for lawful objectives. However, consistent with the intention and actual provisions of the statute, his proposal was brushed aside as "a crippling amendment" and voted down. The House was simply not prepared to pay any attention to the Constitution of the United States.

In the Senate there was, comparatively, a more palpable disposition to give due weight and consideration to the Constitution. However, to give the statute even a semblance of constitutionality its supporters in the Senate were inevitably constrained to stretch and distort the plain language of the statute and, finally, to contradict themselves on several occasions.

The initial thesis of the proponents of the bill was that "the law recognizes the right to strike for lawful purposes and in a lawful manner," [21] but that the statute only prohibited strikes and similar activities for "wrongful objectives." (Id., p. 6.) That was the dominant theme both

[20] Id., at 1554.

[21] Report No. 1508, *supra*, p. 4.

in the House Report and in the House debates. Near the opening of the Senate debate, however, there was a complete reversal of approach. The spokesmen for the bill conceded that the objectives were lawful, but sought to argue that only unlawful means were proscribed, thereby implying that every cessation of work and every peaceful picket, no matter what their occasion, circumstance or purpose, are unlawful.

Thus, Senator White, one of the managers of the bill, stated:

> "As I have said, the parties would be at complete liberty of action, and inhibited only by the general principle that it shall be unlawful by threats, intimidation, duress, and otherwise, to coerce any one. In other words, *the action shall be unlawful if unlawful means are employed.* Otherwise there is the most complete freedom of contractual arrangement between all the parties concerned . . ." (Italics supplied.)[22]

This approach on the part of Senator White and others at the outset of the debate in the Senate was no less fatuous than the original approach in the House. To describe a peaceful strike or picket as "coercive" with the hope of thereby imputing to the peaceful strike or picket something inherently evil is merely to engage in infantile semantics.

The same device is employed extensively throughout appellant's brief. What this argument comes down to is that anything that might in common parlance be described as "coercive" can be restrained. Such an argument consists merely of a convenient play on words. If in any sense all peaceful strikes and pickets are "coercive", then it may be categorically stated that many forms of "coercion" enjoy some constitutional protection. As stated in the case of *In Re Porterfield*, 28 A. C. 102 (Calif.):

> "It is too firmly established to merit much more than the mere enunciation of the fact that not all con-

[22] 93 Cong. Rec. 3243.

> duct embracing or effecting compulsion, coercion, intimidation, threats, and menace is unlawful. . . . Various means of economic suasion such as picketing . . . and refusal to work together . . . may be performed in the exercise of civil liberties, guaranteed by both our Federal and State Constitutions."

Moreover, the statute does not prohibit "coercion" alone. Under Section 506 (a) (1) persons may not use any means "to constrain" a licensee. The word "constrain" has been defined to include the words "urge" and "impel." Hence, under this statute even the elementary right to urge an employer to grant something which he may lawfully grant is declared criminal.

Senator Taylor advanced the obviously valid point that if a strike for a contract that was admittedly lawful is "coercive," then "practically every contract in America is invalid." He added:[23]

> "I have tried to find out what the language in the bill means. Nobody seems to know. It contains the words 'other means.' Nobody knows what those words mean, and no one has been able to tell me whether the threat of a strike is coercion."

Here Senator Austin, another manager of the bill, took up the cudgels and promptly reversed his colleague, Senator White. After giving assurances that the phrase "other means" included the right to strike, he explained that the only strikes that were outlawed were those addressed to illicit purposes. He said:

> "In the conference we discussed fully those words, and it was definitely understood that they included strikes and boycotts . . . They may not strike *to gain advantage of those misdemeanors which are set forth.* However, they may strike for anything that is not unlawful." (Italics supplied.)[24]

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[23] 92 Cong. Rec. 3248.

[24] Ibid.

Senator Taylor would not be put aside by this change of position. He used a very apt illustration to demonstrate that the statute set forth no unlawful objectives which could be gained by any strike, saying:

> "The act for which he was put in jail would not in itself be unlawful. He would be in jail simply because he had used a certain method of attaining an end. On another radio station the employees might have an agreement, openly arrived at, and involving no strike, and they might be doing the very same things, and be scot free. But the other person would be put in jail because he had used certain means to accomplish the same end. It is not the act itself which is made unlawful. It is the method used to reach the end which is unlawful." [25]

Thereafter, Senator La Follette joined in the discussion and declared that, although "contracting is not prohibited," nevertheless employees of radio stations "would be prohibited from using their collective bargaining power or their right to strike if the broadcasting company refused" to grant a contract.[26]

In reply, Senator Tunnell, another manager of the bill once again altered the position of the bill's proponents by saying, "I do not see anything in the measure which would warrant that conclusion," and Senator Johnson, his fellow manager, concurred.[27]

In other words, at this stage of the debate the managers of the bill were asserting that the statute did not prevent the peaceful strike for the objectives set forth in subsections (a) and (b). This assertion, of course, bore no relation to the actual facts and was immediately challenged by Senator Ball, who said:

> "It seems to me that in subsections (a) and (b) we have made unlawful the use of the strike to compel an

[25] Id., p. 3251.

[26] Ibid.

[27] Ibid.

employer to sign a contract, even though it is the same contract which existed before. If that has not been done, then I do not see what use can be made of the entire section."[28]

Nevertheless, Senators Tunnell and Johnson temporarily held to the view, albeit without any attempt at explanation, that the right to strike was not prohibited by this statute—as witness the following colloquy:[29]

"Mr. Hatch: Is the Senator from Delaware convinced that the language of the bill does not preclude the right of collective bargaining and the right to strike?

"Mr. Tunnell: I am convinced that those rights are not precluded.

"Mr. Johnson, of Colorado: I am also convinced that they are not precluded."

At this juncture Senator Taylor took the floor again. He reminded the Senate that Senator Austin had previously expressly said that "Strikes are not permitted for any one of a number of different objectives, some of which are now included in the contracts between the radio entertainers' unions and the employers."[30] Thereupon, Senator Austin arose and, ignoring his own previous, explicit statement that the statute outlawed the right to strike for the named objectives, observed:

"I do not think I said . . . that a strike, which is the sanction behind collective bargaining, is barred by anything in this bill . . ."

. . . . . .

"I do not want my words to be interpreted to mean that these provisions bar the use of the strike as a sanction for collective bargaining."[31]

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[28] Id., p. 3253.

[29] Ibid.

[30] Id., p. 3254.

[31] Ibid.

Subsequently, Senator O'Mahoney presented a hypothetical situation to Senator White which contained all the elements involved in this case. He asked:

> "Assume that in a broadcasting studio there are three artists who are performing night after night on a particular program and they have come to the conclusion that the strain upon their voices or the work which has been placed on their shoulders is too heavy, and they state to the broadcasting studio, 'There ought to be five persons carrying on this program.' Assume, further, that the broadcasting manager replies, 'No; three is enough.' Then those three persons say, 'Very well, we strike to make you employ five.' Would such an act come within the prohibition of the proposed legislation?[32]

Senator White—the same Senator White, it will be recalled, who at the outset of the debate took the position that all strikes were outlawed because they were "coercive"—replied:

> "I think the employees could strike if they wished to do so. If they walked out I think they would be doing something legal."[33]

We reach the climax of this confusing and futile debate when Senator O'Mahoney addressed the same question to Senator Austin. Only a few minutes before Senator Austin had protested against the suggestion that "I have represented that these provisions bar the use of the strike as a sanction for collective bargaining."

But now, in reply to Senator O'Mahoney's question, Senator Austin observed, "The record definitely shows that the words [other means] include boycotts and strikes."[34]

We say that the Congressional debates poignantly illustrate the irreconcilability of this statute with the Constitu-

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[32] Id. 3257.

[33] Ibid.

[34] Ibid.

tion of the United States. Evasions, shifts of position, excessive and beclouding verbiage, cannot and do not alter the basic fact that this statute completely prohibits every strike and every picket and every other means which employees of licensees may utilize in an effort to obtain collective bargaining agreements which the same statute approves. Nothing can alter the fact that such a statute is outstandingly repugnant to the Constitution of the United States.

C. *Errors in Appellant's Approach to The Statute and to The Issues in This Case.*

1. *The statute does not deal with monopolies in the radio broadcasting industry.*

Like those who supported the Lea Bill in Congress, appellant has been confronted by the same insuperable task of assigning some semblance of reasonableness, consistency and constitutionality to a statute that is conspicuously devoid of them. Accordingly, they have been compelled to resort to the same unfortunate techniques employed by some of the supporting Congressmen.

There is an effort to portray defendant James C. Petrillo as a recklessly arbitrary union official with total and unrestrained power over a membership of some 200,000 persons. Appellant would make it appear that that huge membership has no alternative other than meekly to submit to defendant's dictates even though all officials of the American Federation of Musicians are freely and democratically elected at annual conventions of the union.

The foregoing effort is made possible by the device of introducing an entirely alien issue. Appellant reads the statute as though it prohibits and outlaws labor monopolies and then proceeds elaborately to argue the constitutional power of Congress to enact such a statute. Defendant has

at no stage of the proceedings in this case contested that power, and the Court below did not rule upon it because there was and is no occasion so to do.

If the statute actually outlawed labor monopolies in the broadcasting industry and if the question before this Court was whether Congress had reasonably exercised its commerce power in outlawing those monopolies, then it would have been entirely appropriate to show the evidence upon which Congress ostensibly acted. But the instant statute deals not at all with monopolies or restraints of trade. It criminally punishes "*whoever* willfully violates any provision of subsection (a) or (b)",[35] that is, any person—even a single unemployed worker who belongs to no union and who seeks by picket or any other means to compel an employer who has no need for additional employees to put him to work.[36]

If, indeed, there be any relevancy to the Government's multifarious references to the monopolistic practices of the American Federation of Musicians and its President, then, plainly, the information should have so charged, and the Government should have undertaken the burden of proving those charges in a court of law. Instead, it treats the passionately partisan and uncross-examined remarks of persons notoriously antagonistic to the defendant and to the American Federation of Musicians as though they were judicially found facts. A detailed refutation of the "facts" so heavily relied upon by appellant throughout its argument would run this brief into excessive length. An examination of a few of them will suffice to show their utter falsity and unreliability.

Treated as a "fact"—on which the Government subsequently builds constitutional arguments[37]—is the canard

[35] Subsection (d).

[36] On page 100 of its brief, where it argues a different phase of the case, appellant readily concedes that "the Act applies to anyone who intereferes with broadcasting in the ways specified."

[37] See, for example, pp. 44, 76, 78, 79 and 82 of appellant's brief.

that Mr. Petrillo has "the power to expel any member of any local without reason or without trial." (P. 22, appellant's brief.) Counsel for the Government must be familiar with the elementary rule of the law of unincorporated associations, which denies to any person or organization the right or power under any circumstances to remove a member without just cause and without full and fair trial.[38] We categorically assert that neither appellee nor any other officer or affiliate of the American Federation of Musicians has ever disciplined any member without cause and without trial.

Mr. Maddy, whose testimony before Congressional Committees is extensively relied upon by appellant, maintained for several years a continuous barrage of criticism against the policies adopted by a majority of his organization and executed by appellee without experiencing any retaliatory action by the union. It was only when he flagrantly violated a basic rule in the constitution of the American Federation of Musicians—a rule written by a majority of the union long before Mr. Petrillo assumed office—that disciplinary action was instituted against him. When this action was taken, Mr. Maddy was given ample notice of the written charges against him. At his trial he was represented by able counsel of his own choice and was given the fullest opportunity to challenge and cross-examine the testimony against him and to produce all the witnesses and evidence he deemed relevant. Finally—to put the conclusive touch on the conspicuous distinction between the fiction of Mr. Maddy's testimony before the Congressional Committee and the facts as they actually exist—defendant James C. Petrillo voluntarily abstained from any participation in the action taken by the Executive Board of the American Federation of Musicians against Mr. Maddy.[39]

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[38] Chaffee, *The Internal Affairs of Associations*, 43 Harvard Law Rev. 993, 1014, et seq.

[39] Nor is the Board's decision final. He has the full right of appeal to the annual convention and following that, of course, to the courts.

Repeated, too, by appellant (p. 32 of brief) is the so-called "finding" of the House Committee that "the amount of money extorted from the broadcasting industry . . . without moral right" by the "racketeering" methods of the American Federation of Musicians is "probably much in excess of $20,000,000 a year." That astronomical figure can only be described as the product of glaring ignorance seasoned by a vindictive prejudice.[40]

But even if the testimony before the various Congressional Committees had any foundation of truth, it is not, we repeat, properly before this Court. That is so because the evidence adduced by appellant is directed only to the question of the power of Congress to outlaw monopolies, and the Lea Act does not raise that question.

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[40] In footnote 17, p. 33 of its brief, appellant notes that "appellee has urged below that this estimate was excessive and in disregard of amounts ascertainable from the records of the Federal Communications Commission," and then points out that the Commission's records are limited to the wages of staff musicians only and do not include wages paid by commercial sponsors or by hotels, restaurants and the like to orchestras whose programs are broadcast or wages paid by recording companies who employ the musicians to make the records used for broadcasting. Appellant then presents the *estimate* of the War Labor Board that in *various* forms "radio paid musicians $30,000,000."

This attempt on the part of appellant to justify the extravagant $20,000,000 figure advanced by the Committee Report is most illuminating. Our challenge of the figure is not, of course, addressed to the question of wages. Surely, there is nothing immoral or extortionate about earning a high wage. And considering the admittedly huge contribution of music to the tremendous profits of the broadcasting industry, it would hardly be excessively generous if the industry were to pay substantially more than the $30,000,000 "estimated" by the War Labor Board. The fact is that the total revenue obtained by musicians in the form of wages paid by licensees, sponsors, recording companies, hotels and restaurants, plus all contributions to lawful welfare funds, is approximately $25,000,000. However that may be, what we challenged below and what we challenge here is the misstatement contained in the report and repeated by the Government. The figure of $20,000,000 quoted by the Government refers not to wages but to alleged immoral extortion, and that, we say, is elaborately and prejudicially untrue.

2. *The statute does not outlaw objectives.*

We agree with appellant that "it is proper for the legislative body, even more than for the courts, to decide what purposes should be considered unlawful" (p. 67, brief). We insist, however, that Congress decided that the purposes set forth in subsections (a) and (b) are lawful. We insist that it is absolutely impossible for appellant to support its assertion that "clearly the statute does . . . prohibit . . . only strikes to accomplish particular purposes which Congress thought contrary to the public well-being and *declared unlawful.*" (Italics supplied; p. 62, brief.)

Where? In what section of the statute did Congress make that declaration? Appellant points to none because there is none. Incredulously enough, the only section pointed to by the appellant is 506 (c), the one which, as appellant concedes, expressly authorizes the making and enforcement of agreements embodying those very purposes. Appellant in effect argues that that section does not mean what it plainly and admittedly says; or, put otherwise, that Congress has "declared unlawful" the objectives set forth in subsections (a) and (b) by the novel device of declaring them lawful in subsection (c). And Congress adopted this strange procedure because "licensees could be counted on not to agree" to what Congress said they may agree (p. 61, appellant's brief). Appellant's reasoning, we respectfully suggest, is something less than persuasive.

Congress passed subsection (c) because the sponsors of this bill, the owners of the radio broadcasting industry, were not prepared to impose upon themselves the same restraints they sought to impose upon their employees. They were careful to preserve their economic freedom by leaving unabridged their absolute right to do any of the things listed in subsections (a) and (b). It is common knowledge that the average licensee faced with a choice would reject a bid to broadcast a gratuitous, amateur

program in place of a profitable commercial program. So, too, with respect to the hiring of unnecessary employees. There have been many instances in our industrial history where employers have deliberately hired excessive employees. During the wartime, for example, when labor was in short supply many employers hoarded workers.[41] And in some industries it has been a regular practice to maintain an excess of workers in order to keep wages low. It is a matter of common knowledge that from the year 1300 down to the present day there have been countless disputes between employers and employees over the question of the number of apprentices to be employed, the employees seeking a restricted, limited number, and the employers seeking large numbers.

What Congress enacted in subsection (c), and not what some supporting Congressmen may have said they were enacting, is obviously determinative. The complete contradiction between the provisions of the statute and the statements of Congressmen quoted and relied upon by appellant is, we believe, self-evident.

Thus, Representative Lea's statement that Congress is not "powerless to prescribe a rule that prevents a strike being carried on for the purpose of committing a crime" (p. 64, appellant's brief) is completely true and completely irrelevant. The purpose of the strike in the instant case was to obtain the employment of three additional workers, and that is nowhere made "a crime," nowhere made a felony similar to "murder" (Senator Johnson's analogy quoted on page 64 of appellant's brief), or a "misde-

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[41] Truman Committee; 3rd Annual Report, 78th Congress, 2d Session, Report 10, Part 16, March 4, 1944, p. 25: ". . . it was a common practice for manufacturers to hire more workers than they could use. . . ." Baruch Report on West Coast Air Craft Manpower Problems August 19, 1943, *New York Times*, September 17, 1943; *New York Times*, January 12, 1943, p. 14, "There has been more labor hoarding than I like," Mr. McNutt declared at his press conference. "It's a very human trait."; *New York Times*, March 11, 1944, "Truman Committee Scores Hoarding."; "*Enemy Hours*," pamphlet published by the Brotherhood of Railroad Trainmen, March 15, 1945.

meanor" (Senator Austin's analogy quoted on page 66 of appellant's brief). If it were, we should be forced to say that subsection (c) legalizes the making and enforcement of an agreement to commit a crime.

Our essential thesis throughout is that the right to strike or picket for a purpose declared lawful is protected by the Constitution and denied by the Lea Act. The common law cases cited by appellant deal with the restraint of strikes for unlawful purposes and hence are irrelevant. Appellant cites no case wherein the Federal Congress or a state legislature had declared a purpose lawful but proscribed the use of any means in furtherance of that purpose.

Appellant urges, however, that the common law cases support the proposition that the purposes of strikes or pickets may be held unlawful even though the employer may lawfully grant the employee demands of his own accord. But in none of those cases did the parties raise or the courts consider the precise issues here involved. In *Dorchy* v. *Kansas*, 272 U. S. 306, for example, no one raised the issue as to whether or not the payment of a stale claim of an employee who had long since left the employment of the company was a lawful purpose for which men may strike. The Court proceeded on the assertion, which no one questioned or challenged, that it was an unlawful purpose and applied the common law rule that a strike for an unlawful purpose may be restrained since the right to strike was not absolute. Had that case involved a statute expressly authorizing the making and enforcement (by strike) of agreements to pay stale claims and had the defendant raised the issue of the legality of the strike's objective, then—and only then—would the *Dorchy* decision be applicable. As stated by the Supreme Court of Alabama in *Alabama State Federation of Labor* v. *McAdory*, 246 Ala. 1:

> "True, in *Dorchy* v. *Kansas*, 272 U. S. 306, is the statement: 'Neither the common law, nor the Four-

teenth Amendment, confers the absolute right to strike.' . . . We cannot read that case, however, to the end that the State may constitutionally forbid a lawful strike called for a lawful purpose . . ."

The Massachusetts' cases come somewhat closer to the instant case because they are the only ones where the courts have held that an agreement embodying an objective is lawful and enforceable but a strike for that objective is unlawful. The obvious inconsistency of those decisions has been the subject of extensive criticism,[42] and the fact that the criticism of those cases never "suggested that they were in violation of the Federal Constitution" (n. 24, p. 61, appellant's brief) means only that those cases were decided before *Thornhill's* case (*Thornhill* v. *Alabama, supra*) and does not mean that they are not in conflict with the Constitution. Constitutional issues were not raised[43] in labor cases before *Thornhill's* case, and the explanation is a simple, historical one. Labor's status before the law was for many years exceedingly low. Mr. Justice Holmes, for example, could "remember when many people thought that, apart from violence or breach of contract, strikes were wicked as organized refusals to work." (*Vegelahn* v. *Guntner*, 167 Mass. 92.) Mere combinations of workingmen, striving for elementary rights, were treated as something unutterably evil and were universally condemned by the courts[44] who, for the most part, shared the prevailing hostile *animus* against labor and substituted their own preju-

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[42] Sayre, *Labor in The Courts*, 39 Yale Law Journal, 682, 697:

". . . the law of Massachusetts as to the legality of strikes has been reduced to a state of chaos. Neither the Massachusetts courts nor any one else has been able to reconcile or adequately to explain such conflicting decisions . . ."

[43] "The respondents say that the basis of the decision below was revealed in a subsequent opinion . . . (*Opera on Tour* v. *Weber*, 285 N. Y. 348) . . . But this . . . was uttered in a case where the question of the existence of a right to free speech under the Fourteenth Amendment was neither raised nor considered." (*Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 760, p. 774).

[44] Landis & Manoff, *Cases on Labor Law*. Chapter I. Second ed.

dices for reliable and consistent rules of law (see Mr. Justice Brandeis in *Duplex Printing Co.* v. *Deering, supra*). Instead of anything resembling rule or principle or logic or reason, decisions on the legality of union action were rendered on the basis of the particular prejudice of a particular court at a particular time.

About forty years ago, for example, a Federal judge said:

> "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching." (*Atchison, etc., Co.* v. *Gee*, 139 Fed. 582.) [45]

This conception was by no means unique. Indeed, it probably represented the prevailing law.[46]

Small wonder, therefore, that in a judicial atmosphere of that kind neither labor spokesmen nor their legal counsel thought of establishing the rights of labor on a constitutional basis. Their more immediate objective was to liberalize State and Federal statutes and judicial precedents so as to enlarge their elementary rights. It took years to penetrate through the accumulated mass of prejudice before picketing was recognized for what it quite simply and obviously is—a means of stating facts. This recognition was facilitated by the enactment of Federal legislation such as the Clayton Act of 1914, the Norris-LaGuardia Act of 1932, the National Labor Relations Act of 1935, and State legislation patterned upon them.

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[45] See also *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 205, 207, where the Court said that the word "picket" indicated "a militant purpose inconsistent with peaceable persuasion," and that the word "picketing" was a "sinister name," that "peaceful picketing was a contradiction in terms."

[46] *Pierce* v. *Stablemen's Union*, 156 Ca. 70, 103 Pac. 324; *Franklin Union* v. *People*, 220 Ill. 355, 77 N. E. 176; *Vegelahn* v. *Guntner, supra*; *In re Langell*, 178 Mich. 305, 144 N. W. 841; *Glass Co.* v. *Glass Blowers*, 77 N. J. Eq. 219, 79 Atl. 262; *O'Neil* v. *Behanna*, 182 Pa. 236, 37 Atl. 843; *St. Germain* v. *Bakery Workers*, 97 Wash. 282, 166 Pac. 665; *Otis Steel Co.* v. *Molders*, 110 Fed. 698; *Kolley* v. *Robinson*, 187 Fed. 415; *Vonnegut Machinery Co.* v. *Toledo Machine & Tool Co.*, 263 Fed. 192.

It was in the decision in a case dealing with the constitutionality of the Wisconsin Anti-Injunction Act, a prototype of the Federal Norris-LaGuardia Act, that appeared for the first time a statement that foreshadowed the *Thornhill* decision:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." (*Senn* v. *Tile Layers' Protective Union,* 301 U. S. 468, 478.)

On the strength of that statement, a constitutional issue was, for the first time, presented to the Supreme Court of the United States in *Thornhill's* case. Thus, it is clear that in discussing or deciding any case, wherein the claim is made that union action is protected by the Federal Constitution, "the starting point is *Thornhill's* case." (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 293.)

Accordingly, there is no substance in any argument to the effect that some common law decisions have not been criticized as violating the Constitution. We respectfully submit that in so far as Massachusetts, or any other State, or any legislature, would prevent peaceful striking and picketing for an agreement which is expressly authorized by law, it would be acting contrary to the Constitution of the United States.

3. *The statute must be tested on its face*

Appellant insists that appellees cannot in this case argue the constitutionality of the right to picket and the right to strike because he, personally, did not engage in a strike or picket.

The argument assumes that the employees of Station WAAF had a constitutional right to strike and picket in the manner and for the reason they had. Nevertheless, according to this argument, the defendant, James C. Petrillo,

may be imprisoned for the "crime" of causing those employees to exercise their constitutional rights.

The decisions in *Thornhill* v. *Alabama, supra,* and *Carlson* v. *California,* 310 U. S. 106, are conclusive of this issue. The statutes involved in both of those cases expressly prohibited persons from influencing others to strike.[47] In rejecting the contention advanced in *Thornhill's* case that the statute "not be judged upon its face," the Court gave two reasons that are completely applicable here. The Court asserted that "the charges were framed in the words of the statute and so must be given a like construction." (p. 96.) And then the Court gave its "further reason for testing the section on its face:"[48] (p. 97.)

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider* v. *State,* 308 U. S. 147, 162-165; *Hague* v. *C. I. O.,* 307 U. S. 496, 516; . . . It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota,* 283 U. S. 697, 713. One who might have had a license merely for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496. *A like threat is inherent in a penal statute, like that in question here, which does not air specifically at evils*

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[47] The statute in *Thornhill's* case (p. 88) prohibited "loitering for the purpose or with the intent of influencing or *inducing other persons not to . . . be employed;*" and the evidence showed that Thornhill had successfully urged an employee to quit his job.

The ordinance in the *Carlson* case (p. 109) prohibited loitering "for the purpose of inducing or influencing . . . any person from entering any . . . place . . . of employment, . . . or for the purpose of inducing or influencing . . . any person to refrain from doing or performing any service or labor . . . , or for the purpose of . . . coercing . . . any person who is performing, seeking or obtaining service or labor . . ." (Italics supplied.)

[48] In the *Carlson* opinion the Court stated that upon the authority of the *Thornhill* decision "the ordinance in question is to be judged upon its face" (p. 111).

within the allowable area of State control, but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press . . . . An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. *Schneider* v. *State*, 308 U. S. 147, 155, 162-163. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that *it is the statute, and not the accusation or the evidence under it*, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359, 368; *Schneider* v. *State*, 308 U. S. 147, 155, 162-163." (Italics supplied.)

Appellant misconceives the rule respecting statutes that restrict free speech. It strenuously urges that this Court consider only the question of whether or not the statute can be constitutionally applied to the facts charged in the information; that there is no issue before this Court in respect to the deprivation of the constitutional rights of others in different circumstances. As supporting authority it cites cases wherein the Court has narrowly applied the statute to the precise facts before it and refused to consider academic or hypothetical situations. We recognize and do not challenge the general rule of narrow application of statutes to the precise facts in a given case. But the rule covering statutes restricting freedom of speech is an avowed exception to the general rule. A "statute which is the source of restriction on free speech must be 'narrowly drawn to govern the precise situation giving rise to the danger.'" (Mr. Justice Douglas in *Wohl* case, p. 776.)

Obviously, a statute "narrowly drawn" is the very antithesis of a statute narrowly applied. Since appellant's major thesis concedes that the instant statute abridges the freedom of speech of some persons, the statute must fall and

cannot be applied to any persons. (*Cantwell* v. *Connecticut, supra* pp. 307, 311; *Bridges* v. *California, supra.*)

II

THE STATUTE ABRIDGES FREEDOM OF SPEECH IN VIOLATION OF THE FIRST AMENDMENT

Appellant concedes that "peaceful picketing . . . is a form of speech or writing within the meaning of the First Amendment" and that "the picketing was peaceful" in the instant case (p. 7, appellant's brief).

It is argued, however, that the Constitution does not protect "coercive picketing" (p. 70, *et seq.*, appellant's brief), or "picketing for an unlawful purpose . . . when there is plainly a clear and present danger that it may bring about substantive evils which Congress has a right to prevent" (Id., at p. 69). There is, as we now show, no merit to either of these arguments.

A. *Peaceful Picketing That Threatens Economic Injury is Within The Protection of The First Amendment*

Appellant's entire argument on what it calls "coercive picketing" (p. 70-83 of brief) is built upon the premise that speech which threatens economic injury" (p. 70) is beyond the protection of the First Amendment.

If that premise were at all tenable, then the First Amendment offers no defense whatever to any destructive legislative or judicial invasion of the "workingman's means of communication" (*Meadowmoor* case, at 293). For, obviously, every employee picket publicizing the facts of a labor dispute threatens economic injury to some employer.

The *Thornhill* opinion recognized the "coercive effect"[49] of picketing, saying (p. 104):

> ". . . It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advanta-

[49] Mr. Justice Douglas concurring in *Bakery & Pastry Drivers* v. *Wohl, supra*, p. 776.

geous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society."

Nevertheless, the Court expressly held (p. 105):

"... that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448."

See also *Cafeteria Employees' Union* v. *Angelos, supra; Thomas v. Collins*, 323 U. S. 516.

Similarly, in *American Federation of Labor* v. *Swing, Supra*, the Court held (p. 326):

"Communication by such employees of the facts of a labor dispute, deemed by them to be relevant to their interest, can no more be barred because of concern for the economic interest against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case."[50]

We need but briefly add to what has already been said herein (p. 24, *supra*) concerning the irrelevance of appellant's attempted analogy with cases under the Sherman Act. That Act condemns certain conditions regardless of the methods by which they are brought about. The instant statute does the opposite; it authorizes specified conditions but prohibits the means usually employed by workers to attain them.[51] If, for example, the hiring of more employees than are needed were a "restraint of trade" within the meaning of the basic policy and language of the Sherman Act, then, clearly, there is far more "restraint of trade"

[50] "Courts, though differing as to the allowable scope, pretty generally agree that picketing is a legitimate means of *economic coercion*, if it is confined to persuasion and is free of molestation or threat of physical injury or annoyance. *Frankfurter & Green, The Labor Injunction*, p. 31." (*Senn* v. *Tile Layers' Protective Union*, 222 Wis. 383, 268 N. W. 270.) (Italics supplied.)

[51] If the Sherman Act provided that persons may agree to fix and maintain prices but prohibited all persuasion or economic pressure to negotiate such agreements, then the two statutes would be analogous.

where a licensee enters into a contract to hire more employees (which is admittedly permitted by the instant statute) than where a union merely seeks to achieve such an agreement (which is prohibited by this statute). A statute which expressly legitimates a contract [52] in restraint of trade and only strikes down the methods of its attainment is not only not analogous with the Sherman Act but directly antithetical to its express language and obvious design.

The Sherman Act cases cited by appellant merely hold what appellee concedes, namely, that Congress may prohibit any acts taken in pursuance or execution of a conspiracy or combination outlawed by Congress. They do not hold that persons may not by speech or similar means seek objectives that are approved by Congress.

Equally unpersuasive is "The National Labor Relations Act analogy" (p. 74, *et seq.*, appellant's brief). Appellant here is trying to compare the superior economic power of employers over their employees with that of appellee over members of the American Federation of Musicians. The argument, as we understand it, is that just as in some cases the Court restrained employer speech because his superior economic power made it coercive so may appellee's speech be restrained because of his "authority over the musicians" (p. 77, appellant's brief).

We deny that there is any valid basis of comparing the power of employers over their employees with that of appellee over the membership of the Musicians' Union. But even assuming arguendo that they are comparable, it is clear beyond debate that the free speech cases under the National Labor Relations Act are totally irrelevant here. That Act deals directly with employer-employee relations, whereas the instant statute affects not at all the relationship between union officials and union membership. It is precisely because of that obvious distinction that Mr. Justice Douglas declared (*Thomas* v. *Collins*, *supra*) that the "National

[52] The very first phrase in the Sherman Act provides that "Every *contract* . . . in restraint of trade . . . is hereby declared to be illegal." (Italics supplied.)

Labor Relations Act cases would be relevant here if we were dealing with legislation which regulated the relations between unions and their members."

This phase of appellant's argument continues an erroneous assumption that appears throughout its brief, namely, that the statute prohibits conduct only on the part of omnipotent leaders of extraordinary well disciplined unions. Indeed, at some points of its argument appellant would almost make it appear that the only man in America to whom the statute could constitutionally apply is appellee, James C. Petrillo. The fact is, of course, that any such interpretation of the statute completely confounds its plain provisions. If the Lea Act means anything, it means that anybody, be he a union officer, a union member, a non-union employee, a potential employee, or anybody else, will be criminally prosecuted if he does anything that threatens to constrain or compel an employer to do any of the things listed under subsections (a) and (b) and permitted under subsection (c). As appellant readily concedes when arguing the question of discrimination, the Act extends "to practices by *anyone.*" (Italics supplied.) (P. 100, appellant's brief.)

An examination of the National Labor Relations Act cases cited by appellant further emphasizes their inapplicability. The first group cited (n. 29, n. 30, p. 74 of brief) deal with employer speech in the form of *threats of action expressly forbidden by law*, such as firing employees. Here, there is no threat of unlawful action; there is merely the truthful publication of the fact that a licensee has refused to grant an agreement that the law p[illegible] him to grant.

The second group of cases relied upon by appellant (p. 75 of brief) involve employer statements which, when considered in connection with other employer activities, were forbidden. These cases are readily distinguishable on the ground that the Lea Act prohibits all picketing for certain purposes specified regardless of any other circumstances surrounding such picketing. However, in view of the different opinions on this question expressed by various mem-

bers of this Court in the *Thomas* case, *supra*, it is well, we believe, to inquire more exhaustively into the essential differences between the National Labor Relations Act and the Lea Act.

The former statute is premised on the express Congressional finding, grounded in obvious reality, that the economic power of employers is superior to that of employees. In order to equalize that power, Congress adopted a policy of "protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing" (Sec. 1). Pursuant thereto Congress carefully set up an elaborate and detailed administrative machine that would prevent employers from engaging in practices designed to frustrate the aforementioned employee rights—practices made possible by their dominant economic power.

The importance of the administrative machinery established by the National Labor Relations Act cannot be overemphasized. No employer who violates the National Labor Relations Act is subjected to direct criminal prosecution. It is only after an expert administrative tribunal has found in a particular case, after full investigation and formal hearing, that the employer has violated the Act that a cease and desist order expressly adjusted to the particular circumstances of that case is issued against the employer. Even then, the employer is not subjected to any sanctions until and unless the order is reviewed and adopted by a court.

Not so, of course, with the Lea Act. Here, there has been no express Congressional finding that employees in the broadcasting industry have greater economic power than employers in that industry, and, we add, such a finding would be absurd on its face. Here, there is no exhaustion of careful, administrative procedures before persons are subjected to sanctions. Here we have a criminal statute, employing general and all-inclusive language, which operates directly on any person using any means to compel certain approved action on the part of a licensee. "A decree,

arising out of a particular controversy and adjusted to it, raises totally different constitutional problems than those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance." (*Meadowmoor* case, *supra*, p. 292).

Thus, even if the National Labor Relations Act treated employer statements in the same manner as it treated employer action, it would, we submit, be crucially different from the manner in which the Lea Act treats picketing. However that may be, in spite of the policy, design and operation of the National Labor Relations Act the courts have, because of the First Amendment, treated employer statements entirely different from employer action such as financial contributions to favored unions or discriminatory discharges. In *National Labor Relations Board* v. *Virginia Electric & Power Company*, 314 U. S. 469, the Court emphasized (p. 477) that

> "Neither the Act nor the Board's order here enjoins the employer from expressing its views on labor policies or problems, *nor is a penalty imposed upon it* because of any utterances which it has made." (Italics supplied.)

The Court merely said that the fact that speech accompanied a "complex" of unlawful activities does not prevent the Board from restraining the unlawful activity or from inquiring[53] into what the employer said.

> "If the Board's ultimate conclusion is based upon a complex of activities such as the anti-union background of the Company, the activities of Bishop, Ed-

[53] *May Department Store Co.* v. *National Labor Relations Board*, 326 U. S. 376, cited by appellant, also merely holds that the Board can consider statements made by employers as part of a course of unlawful conduct. It did not hold that the statement themselves could be restrained (p. 386):

> "We find no basis for eliminating the announcements or the publication *from consideration* on the ground that they were an exercise of the right of free expression, secured by the First Amendment. They are a part of the totality of Company activities and were properly received by the Board *as evidence* of the unilateral action of the employer." (Italics supplied.)

wards' warning to the employees that they would be discharged for 'messing with the CIO,' the discharge of Mann, the quick formation of the Independent, and the part which the management may have played in that formation, that conclusion would not be vitiated by the fact that the Board considered what the Company said in conjunction with what it did. The mere fact that language merges into a course of conduct *does not put that whole course without the range of otherwise applicable administrative power.* In determining whether the Company actually interfered with, restrained, and coerced its employees the Board *has a right to look at what the Company has said as well as what it has done.*" (Italics supplied; p. 477-478.)

The actual decision in that case was to remand the cause because "the Board specifically found that . . . utterances were unfair labor practices," and the Court would not "sustain a finding of coercion with respect to them alone" (Id., p. 479). That decision is plainly no authority for the proposition that speech on the part of persons enjoying and exercising dominant economic power is "coercive" in the sense urged by appellant, namely, that it is beyond the protection of the First Amendment.

In *National Labor Relations Board* v. *Ford Motor Co.*, 114 Fed. (2) 905, 913; certiorari denied, 312 U. S. 689, employer statements which the Board found "coercive" in their content and in the manner of their distribution were specifically made the subject of a Board mandate. The Court refused to enforce that order, saying (p. 914):

> "Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment."
>
> . . . . . .
>
> ". . . To the argument of the Board that the potentiality of opinion to coerce is to be tested by whether it did in fact coerce, the Supreme Court in the same case [*Thornhill's* case, *supra*] makes answer: 'that . . . every expression of opinion on matters that are important has the potentiality of inducing action in the interest of one rather than another group in society'" (p. 915).

". . . We are forced to the conclusion that the findings of the Board declaring the Ford publications and their distribution to be in pursuance of an unfair labor practice, must be set aside and the appropriate provision of the order commanding restraint denied enforcement" (p. 915).

In *National Labor Relations Board* v. *American Tube Bending Co.*, 134 Fed. (2d) 993; certiorari denied, 320 U. S. 768, the whole record upon which the Board found unfair labor practices consisted only of employer statements which the Board found to be "coercive." The Court, on the authority of the *Virginia Electric & Power Company* case, *supra*, reversed the Board's order and dismissed the proceeding. See also *Big Lake Oil Co.* v. *National Labor Relations Board*, 146 Fed. (2d) 967; *Peter J. Schweitzer, Inc.* v. *National Labor Relations Board*, 144 Fed. (2d) 520; *Edward G. Budd Manufacturing Co.* v. *National Labor Relations Board*, 142 Fed. (2d) 922.

Thus, the actual decisions show that even where a statute is reasonably premised upon an express Congressional finding of unequal economic power, and even where the statute is so designed as to preclude any punishment except after the findings and conclusions of an expert tribunal in a concrete and particular case have been sustained by a court of law, nevertheless the First Amendment applies and prevents restraints upon or punishment of free speech. But if, as has been suggested, the free speech cases under the National Labor Relations Act cannot be distinguished from those following *Thornhill's* case, *supra*, we urge that "the remedy is not to allow" any legislature or court "improperly to deny the right of free speech but to apply the same rule and spirit of free speech cases whoever the speaker." (Mr. Justice Jackson concurring in the *Thomas* case, *supra*, p. 548.) [54]

[54] "Unless the right of free speech is enjoyed by employers as well as by employees, the guarantee of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person." (*Midland Steel Products Co.* v. *National Labor Relations Board*, 113 Fed. (2d) 800, 804.)

B. *The Statute's Proscription of Speech Does Not Meet The Clear and Present Danger Test.*

As in its argument on the right to strike (p. 58 of brief) appellant argues that picketing for an unlawful purpose is not constitutionally protected (p. 83, *et seq.*). These arguments are premised on the suggestion that the instant statute outlaws objectives rather than means—a suggestion which, as we believe we have already fully shown,[55] is specious in the extreme. Appellant concedes that under the statute a licensee can lawfully agree to employ more persons than are "needed." If that agreement is lawful, and if to strike or picket to obtain such an agreement is declared criminal, then what is made unlawful is the means (the strike or picket) and not the objective (the agreement), and the most prolix sophistry cannot alter that simple syllogism.

But even if we assume what is plainly not the fact, namely, that this statute declares objectives to be unlawful, still such a declaration could not destroy the protection of the First Amendment. Such a device, if successful, would make the phrase "freedom of speech" an "empty"[56] one instead of the "vital"[57] liberty that this Court has "guarded with a jealous eye." For, it would only be necessary for the Congress or for the various state legislatures simply to declare traditional labor objectives to be unlawful, and thereby the workingman's means of communication would be completely obliterated and the very essence of free speech wholly destroyed. Under our concepts of freedom and our system of government no legislature can prejudge the merits of any controversy and thereby preclude that freedom of discussion and communication of ideas necessary to discover and spread political and econ-

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[55] See pages 28, et seq. of this brief.

[56] *Schneider v. State*, 308 U. S. 147, 161.

[57] Ibid.

omic truths. No legislature can, by abridgment of freedom of speech, impair "those opportunities for public education that are essential to effective exercise of the power of correcting error" (*Thornhill*, at p. 95).

That the enjoyment of the Bill of Rights cannot be made contingent upon the changing winds of political doctrines was laid down in unmistakable language in the decision in *West Virginia* v. *Barnette*, 319 U. S. 624, where the Court stated (p. 638):

> "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; . . ."

And in *Schneider* v. *State*, *supra*, it was held (p. 161) that

> ". . . Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maitnenance of democratic institutions."

The facts and the holding in the case of *Wohl*, *supra*, are completely applicable. A Teamster's local in that case picketed the customers of certain "peddlers" because those peddlers would not employ a union relief man, that is, because they would not employ a person who was not "needed." The New York Court held that a "labor dispute" within the meaning of the New York statute was not involved, or, put otherwise, that under that State's policy the purpose of the picketing was unlawful, and enjoined the picketing. This Court reversed that holding, saying (p. 774) that "one need not be in a labor dispute as defined

by a state law to have a right . . . to express a grievance in a labor matter."

To the same effect is the decision in the *Swing* case, *supra*. There, too, it was the established policy of the State to prevent picketing in the circumstances there involved. But this Court declared (p. 326) "The scope of the Fourteenth Amendment is not confined by the notion of a particular State regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the State."

We do not here contend that the Constitution vests an absolute right to picket or strike. It is conceded that even these basic liberties may, in appropriate circumstances, be subject to reasonable regulation or restraint. But, "the power of a State to abridge freedom of speech and of assembly is the exception rather than the rule and . . . must find its justification in a reasonable apprehension of danger to organized government." (*Herndon v. Lowry*, 301 U. S. 242, 258.)

Legislatures or courts may not deprive persons of their civil liberties by the easy method of declaring unlawful the purposes for which they may be exercised. They can only justify such deprivation to prevent a "clear and present danger" to some "substantive evil." *Schenk* v. *United States*, 249 U. S. 47, 52; *Thornhill* v. *Alabama*, *supra*, p. 105; *Cantwell* v. *Connecticut*, *supra*, 311; *Thomas* v. *Collins*, *supra*, p. 527.

In the *Bridges* case, *supra*, the Court analyzed the leading cases dealing with the clear and present danger doctrine and reached this conclusion (p. 263):

> "What finally emerges from the 'clear and present danger' cases is a working principle that the *substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished*... Those cases do not purport to mark the furthermost constitutional boundaries of protected ex-

pression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press.' *It must be taken as a command of the broadest scope that explicit language read in the context of a liberty loving society, will allow.*" (Italics supplied.)

Since the only possible evil to which the picketing in the instant case has been addressed is that of hiring excessive employees, and since the Congress has expressly legitimated agreements for the employment of excessive employees, it is plain that what we have here is hardly an evil much less an "extremely serious" evil.

If, as the statute affirmatively declares, WAAF may agree to employ more persons than are "needed," by what possible reasoning can it be said that the Musicians' Union may not announce to the world—by picket or otherwise—that WAAF has refused to enter into such an agreement? What is so sacrosanct about the refusal of WAAF to comply with the union's lawful demand as to render criminal the truthful publication of that fact? What "clear and present danger" to what "substantive evil" is created by such publication? The answers, we submit, are self-evident. Emotion, not reasoning, attended the introduction and enactment of this statute. There is nothing so sacrosanct about any licensee's acceptance or rejection of any lawful union demand as to justify a blackout on publicity. It is hardly an "evil" to seek employment, and the only "danger" involved is to the licensee's profits. All that we have here is a simple labor dispute between Station WAAF and the Chicago Federation of Musicians, and "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." (*Thornhill's* case, p. 102.)

III

THE STATUTE IS CONTRARY TO THE THIRTEENTH AMENDMENT

All of the arguments advanced in connection with our discussion on the right to picket apply equally to the right to refuse to work. For, "like the right to make a speech," the right to "refuse to work, and to choose the terms and conditions under which one will work," is a "fundamental human liberty which the State may not condition or abridge in the absence of grave and immediate danger to the community." (*Stapleton* v. *Mitchell*, 60 F. Supp. 61.)

Analyzed, appellant's argument actually would compel the conclusion that Congress has unlimited power to force persons to work against their will for the private profit of others. If, for example, the statute made it criminal for any person to compel a licensee by any means to pay more wages than are needed, then appellant's reasoning here is applicable to the last detail, and, if correct, such a statute would have to be upheld. Appellant would argue that the right to strike is not absolute, that the peaceful strike is coercive, that the objective of obtaining excessive wages is unlawful even though the licensee can voluntarily agree to grant them (because Congress would be relying upon the self-interest of the licensee not to grant excessive wages), and that it would be reasonable for Congress to impose that limitation because excessive wages would ruin many small radio stations and thereby limit the service of radio to the public.

Nor is that example entirely hypothetical. As we have shown, the enactment of this statute is merely the culmination of an extended struggle between the owners of the radio broadcasting industry and their musician employees "as to the share or division between them of the joint product of labor and capital." (Mr. Chief Justice Taft in *American Steel Foundries* v. *Tri-City Central Trades*

Council, supra, p. 209.) The demand for the employment of more workers is, plainly, a demand on the employer to pay more wages to more persons. We cannot conceive that a simple strike for wages or for any other economic advantage which is approved by the Congress can, under our Constitution, be outlawed. "We are not advised of any rule of law under which any man in this country will be forced to serve with his labor any other man if he does not wish to serve." (*Henderson* v. *Coleman,* 7 Sou. (2) 117 (Fla.).)

Recently, this Court has said that "No State can make the quitting of work any component of a crime or make criminal sanctions available for holding unwilling persons to labor." (*Pollock* v. *Williams,* 322 U. S. 4, 18.) And that, we submit, is precisely what Congress has done in passing the Lea Act.

In *Stapleton* v. *Mitchell, supra,* it was held:

> "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the State may not condition or abridge in the absence of grave and immediate danger to the community. But by Section 8(3), (12), (13), the State of Kansas has not only conditioned these rights, but expressly prohibited them and made their exercise a criminal offense. In this setting we think it is the inherent prohibitions of the statute standing alone which impose the unconstitutional restraint, and those against whom the statute is plainly directed should not be required to abide the processes of criminal justice in order to obtain the redress to which they are entitled under the Federal Constitution."

In *Alabama State Federation of Labor* v. *McAdory, supra,* the Court said:

> "And we think it is well-settled that the members of a labor organization—that is, workmen who are not bound by contracts for a definite period and have not,

by agreement freely made, given up such rights—may, without liability, abandon their employment at any time, either singly or in a body, as a means of compelling or attempting to compel, their employers to accede to demands for better terms and conditions . . . ."

In *Bailey* v. *Alabama*, 219 U. S. 219, this Court held with respect to the Thirteenth Amendment that (p. 241):

> "The plain intention was to abolish slavery of whatever name and form and all of its badges and incidents; to render impossible any state of bondage, to make labor free by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude."

Never since the adoption of the Thirteenth Amendment has any statute enacted by the Congress or by any other legislature in this country gone to the incredible extreme of the Lea Act. Under it a single individual is chained to his job, a single employee may not quit his employment with a licensee in furtherance of any of the objectives listed in subsections (a) and (b). Thus, if Station WAAF had employed a single musician, and if that musician demanded that three additional persons be employed and if he quit upon rejection of that demand, he would have violated the statute no less than has appellee James C. Petrillo.

Even the Smith-Connally Act (Public Law 89, 78th Congress), passed as an extraordinary war emergency measure, was careful to provide:

> "Sec. 6(a): "No individual shall be deemed to have violated the provisions of this section by reason only of his having ceased work or having refused to continue to work or to accept employment."

Appellant makes reference to the case of *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, in which this Court "implied" (p. 55, appellant's brief) that the provision in the Railway Labor Act prohib-

iting, for a period of thirty days, any changes in conditions out of which the dispute arose was a lawful "limitation upon 'the right to strike'." (Ibid.) But this Court was careful to observe that (p. 566):

> "The provision of Sec. 10 is to be read in connection with the qualification in subdivision eight of Sec. 9 that nothing in the act shall be construed to require an individual employee to render labor without his consent or as making the quitting of service by an individual employee an illegal act, and that no court shall issue any process to compel the performance by an individual employee of labor without his consent. The purpose of this limitation was manifestly to protect the individual liberty of employees . . ."

Except in circumstances not here relevant,[58] there is no logical theory under which the quitting together by two or more enjoys less constitutional protection than the right of a single individual to leave his employment, particularly if the concerted quitting is for an economic purpose deemed

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[58] We know of no case wherein this Court has expressly held that a concerted cessation of work is prohibited by Section 10 of the Railway Labor Act, and that such prohibition is constitutional. However, whatever ultimate disposition the Court may make of this provision in the Railway Labor Act, it can have no bearing on this case for these reasons:

1. It is a regulation of the right to strike and not a flat prohibition. The right to strike must be held in abeyance only for a short, limited period of time.

2. It expressly preserves the right of the individual employee to quit his work under any circumstances.

3. The provision is addressed to employers as well as to employees. The former, too, may not do anything to change existing conditions for the prescribed period.

Appellant also cites the recent case of *United States* v. *United Mine Workers of America*, Nos. 759-760, decided March 6, 1947, in its section of the brief dealing with the Thirteenth Amendment. Although it is cited in support of its argument that no one has the constitutional right to order others not to work, nevertheless it is well to point out that that case does not hold by implication or otherwise that usual peaceful strikes for lawful purposes may be restrained. That case, it will be recalled, involved an order issued by defendant Lewis to *government* employees to strike in presumptive breach of contract and in presumptive violation of a statute passed by Congress in the exercise of its extraor-

necessary for their protection and approved by the law. Surely, there is far greater moral justification for a concerted leaving of employment because of working conditions which the workers consider self-destroying than for an individual's leaving of employment for purely arbitrary reasons. A prohibition under threat of criminal penalty against leaving work, whether imposed on one, one hundred, or one thousand employees is a sovereign command to continue working, and nothing can contravene the fact that involuntary servitude is thereby imposed.

IV

THE STATUTE IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. *The Phrase "Number of Employees Needed by Such Licensee" is Vague, Indefinite and Uncertain.*

Section 506(a)(1) contravenes the due process clause of the Fifth Amendment because it is not sufficiently explicit in defining the new offense. We invoke the familiar principle "that a criminal statute which defines the offense in such uncertain terms that persons of ordinary intelligence cannot in advance tell whether a certain action or course of conduct would be within its prohibition is subject to the attack of unconstitutionality as violative of . . . due process" (83 L. Ed. 893).

In *Connally* v. *General Construction Company*, 269 U. S. 385, the Court nullified a State statute requiring a contractor, under penalty, to pay his employees "not less than the

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dinary war powers. Moreover, it may be fairly assumed that this Court adopted the interpretation placed upon the injunction of the Court below to the effect that it did not apply to the miners themselves. (See Record of that case, pp. 169, 173, 177, 178.). "Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those presented by an abstract statute with an overhanging and undefined threat to free utterance." (*Meadowmoor*, p. 292.)

current rate of per diem wages in the locality where the work is performed" as being so uncertain as to deprive the contractors of due process of law. The Court said (p. 391):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law . . .
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> . . . . . .
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> ". . . Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

In *Lanzetta v. New Jersey*, 306 U. S. 451, the Court declared an anti-gangster law unconstitutional because of vagueness and uncertainty, saying (p. 453):

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids . . ."

In *United States v. Cohen Grocery*, 255 U. S. 81, the Court affirmed the following ruling of the Court below:

> "Therefore, because the law is vague, indefinite and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid . . ."

See also *Weeds* v. *United States*, 255 U. S. 109; *International Harvester Company* v. *Kentucky*, 234 U. S. 216, 221; *Collins* v. *Kentucky*, 234 U. S. 634; *Herndon* v. *Loury*, *supra*; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445.

The gravamen of the crime set forth in Section 506(a)(1) is the compulsion of a licensee "to employ any person or persons in excess of the number of employees needed by such licensee to perform actual services." The objective and subjective criteria which determine the number of men employed for any given job (such as the financial resources of the employer, the complexity of the task, the desired quality of the product, the skill of both those who manage and those who labor, the employer's sociological views, the employees' energy and cooperativeness, and a legion of others) are necessarily, so varied, abstract and elusive as to preclude their condensation into any standard sufficiently definite to meet the requirements of the rule against vagueness.

The debate in the Senate reflects the uncertainty and indefiniteness of the challenged language. Senator Johnson first said it was "the district attorney who makes the determination whether they have more than they need."[59] Later, upon Senator O'Mahoney's statement that "I have read the Conference Report from beginning to end, and I find no language in it which provides who shall determine whether or not the number of employees which the employer must employ is in excess of the number required to perform a certain function," Senator White, another manager of the bill, categorically stated, "I would say, without hesitation, that in all instances the employer should determine the question."[60]

Thereafter, the following colloquy took place:

> "Mr. O'Mahoney: But I am asking who determines whether or not the number of employees is in excess of the number needed.

[59] 92 Cong. Rec., p. 3245.

[60] Id., p. 3256.

"Mr. Johnson: The Court.

"Mr. O'Mahoney: Oh, no; because here we are condemning a certain act. If we are to condemn an act we must know precisely what the act is which we condemn."[61]

It matters not, of course, whether it is the district attorney, the employer or the court who was intended by Congress to make that crucial determination. What certainly matters, what is indispensable to elementary justice and fair play, is that reasonable persons subject to the statute be sufficiently informed so as definitely to know *at the time of performing an act* that it is a crime. Here, there is nothing remotely resembling an informing guide or standard.

Congress has gratuitously given to licensees the extraordinary power to subject their employees to criminal prosecution almost at will. All they need do is arbitrarily to discharge a large number of employees on the assertion that they are not needed. Any resistance on the part of the employees by strike, picket or otherwise would expose them to criminal prosecution.

The Court may take judicial notice of the large number of labor disputes that occur as a result of wholesale discharges, arbitrary or otherwise. Employees in all other industries have the full and unquestioned right to challenge such action by their employers without fear of prosecution or imprisonment, and the right thus possessed by these other employees effectively prevents many employers from wanton discharges. But this statute gives to employers in the radio broadcasting industry the privilege to be as contemptuous and dictatorial as the caprice of any moment may direct and arbitrarily to deprive their employees of their means of livelihood. All they need do is make the self-serving declaration that the number discharged are not "needed" and the employees can take no effective action in reply without subjecting themselves to the probability of prosecution and jail. The full absurdity of this

[61] Ibid.

situation is realized upon consideration of the fact that an orchestra leader, honestly exercising highly skilled and artistic judgment as to the number of persons "needed" to perform a musical rendition, would be subjected to prosecution and the possibility of jail if a licensee, motivated only by venal standards of gain and profit, should disagree.

The Government's argument on this point begins with an extensive reference to and a highly legalistic interpretation of the isolated comments of various Congressional supporters of the bill in order to show what Congress "was driving at." (P. 110 of appellant's brief.) Appellant's effort is, we submit, ludicrous on its face. It concedes that Congress has in fact used indefinite language in the statute itself but relies upon its research into and analysis of the legislative history of the statute to dissipate that vagueness. Appellant forgets that the rule against vagueness is addressed to the language of the "penal statute" itself, and that it protects the "ordinary person" (*Connally* case, p. 33) who, of course, can hardly be expected to become completely familiar with the legislative debates or to be possessed of the unique skill at interpretation displayed by appellant.

The next argument advanced by the Government is that because the bill was amended so as to read "needed by such licensee" instead of "wanted by such licensee," therefore the "whim" of the licensee does not interpret the guilt of others. The important and only relevant point here is whether the standard of conduct prescribed by the statute is sufficiently definite, and appellant does not and cannot show that the word "needed" makes that standard any more definite or less vague than the word "wanted." Indeed, the contrary is true. Whatever other constitutional obstacles[62] to the enactment of the original language, it is

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[62] It would, plainly, shock our concepts of justice and due process to make imprisonment of one person contingent upon the desire or whim of another. "The state of mind of the truck owner cannot be decisive of

less offensive to the rule against vagueness. For, the number of employees a licensee wants is made definite and clear every time he accepts or rejects a request for additional employment.

Appellant next engages in the "difficult" "process of matching words and phrases in" other statutes although it concedes "that the question in each case must ultimately be one of judgment based largely on the context of the particular law and the subject with which it deals." (P. 129, appellant's brief.) The conclusion reached is that "if it is thought that the text of the law itself is not sufficiently definite," then the principles contained in other cases may "point to a correct decision here" (ibid.), meaning, we presume, a decision by this Court. If, indeed, "the text of the law itself is not sufficiently definite," then the law must fall. It cannot be saved by virtue of the ability of this Court—as distinguished from that of the "ordinary person"—to perform the difficult task of abstracting principles from a host of other cases dealing with different statutes.

In arguing the point of scienter or willfulness before the Court below, appellant introduced the case of *Screws v. United States, supra,* and on its authority insisted "that the claim that a statute leaves a defendant in doubt as to whether he is committing a crime is unavailable when the crime must consist of conduct which is willful." (P. 57, Government's brief below.) Here, appellant is more restrained. It is careful to "not suggest that the presence of a requirement as to willfulness will without more be sufficient in a statute to satisfy the constitutional requirement" (p. 124, appellant's brief), and then seeks to dis-

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the guilt of these defendants." (*United States* v. *Local 807*, 315 U. S. 521, 532.) While the language finally adopted by Congress is not so extreme, it is, we submit, because of the manner in which it vests so extraordinary a weapon in the hands of licensees (see discussion p. 55, *supra*), sufficiently harsh to violate due process.

tinguish the very *Screws* case, *supra*, which it introduced and upon which it placed its main reliance below.

It is, we submit, self-evident that an indefinite criminal statute cannot, in the language of the dissenting opinion in the *Screws* case (p. 153) "be rendered definite by requiring that a person 'willfully' commit what Congress has not defined but which, if Congress had defined, could constitutionally be outlawed." And the opinion of Mr. Justice Douglas in that case is in full agreement. He makes it crystal clear that under the Constitution one cannot be criminally punished for any act which is not clearly defined, no matter how willfully that act is performed. He said (p. 104):

> ". . . For the specific intent required by the Act is an intent to deprive a person of a right *which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.* . . . He violates the statute not merely because he has a bad purpose but *because he acts in defiance of announced rules of law.* He who defies a decision interpreting the Constitution knows precisely what he is doing. If sane, I hardly may be heard to say that he knew not what he did. *Of course, willful conduct cannot make definite that which is undefined.* But willful violators of constitutional requirements, *which have been defined,* certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional *requirement which has been made specific and definite.* (Italics supplied.)

Thus, the unanimous view of this Court in the *Screws* case, the most recent and comprehensive expression on the question of indefiniteness, makes it clear that there is no magic to the word "willful," and that the Constitution of the United States still requires definiteness and certainty in criminal statutes. The phrase "in excess of the number

of employees needed" is nowhere "made specific"; not in "the express terms of the Constitution or Laws of the United States," not in any of the "decisions interpreting them," and not even by reference to any custom or practice in the radio broadcasting industry or in any other industry. It is a phrase that is totally vague and indefinite and, upon the uncontroverted authority of the decisions of this Court, repugnant to the due process clause of the Fifth Amendment.

In *United States* v. *Ragen*, 314 U. S. 513, the evidence showed that defendants had, under the pretext of taking "a reasonable allowance for salaries," made unconscionable deductions on their income tax returns and had, indeed, destroyed old records, manufactured back-dated corporate minutes, and the like. This retroactive manipulation of the corporation's records was done after defendants had learned of a decision of the Board of Tax Appeals which would have exposed them to greater tax liability than they owed under the true records. In the face of such evidence, the Court found little difficulty in applying a statute providing that "any person who willfully attempts in any number to evade or defeat any tax . . . shall . . . be guilty of a felony." Moreover, the Court pointed out that the phrase "reasonable allowance" was one of long standing and well-understood meaning.[63] The Court said (p. 524):

> ". . . The statutory specification of permissible deduction here in question is of long standing. For years thousands of corporations have filed income tax returns in accordance with the direction to deduct 'a rea-

[63] Appellant would make light of the factor of the age of the statute in determining the question of vagueness. (P. 121, appellant's brief.) This Court has emphasized that factor in virtually every case where the issue of indefiniteness was raised, and the Court found sufficient definiteness. Indeed, the rule itself, as formulated by this Court, always refers to statutes "creating a *new* offense." It is self-evident that any phrase, no matter how abstruse originally, will and does, after a long experience of application and interpretation, acquire concrete and clear meaning.

sonable allowance for salaries or other compensation for personal service actually rendered,' and there has not been any apparent general confusion bespeaking inadequate statutory guidance. A finding of unconstitutional uncertainty in this section of the act as applied here would be a negation of experience and common sense."

The statute involved in *Gorin v. United States*, 312 U. S. 19, punished persons who obtained or delivered information "connected with" or "relating to" the "national defense" with "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation."

The Court suggested that if the statute punished persons for merely obtaining or delivering information relating to or connected with the national defense, there would be a serious question as to its validity (p. 26). But the statute required more than that, it required a person to obtain or deliver such information with the specific purpose of harming the United States. Surely, a person who deliberately goes about obtaining or delivering national defense information for that purpose is doing a definite act which he and every other reasonable person knows to be criminal. Moreover, here again, the Court pointed out that the phrase "national defense" had a long statutory history and "a well understood connotation." (P. 28.)

Appellant ends its discussion on the question of indefiniteness with the statement that "appellee has no standing to contend that the Act is too indefinite." (P. 131, appellant's brief.) Why not? Since when has it become the rule of this land that any person, be he a labor leader or anyone else, is without enough status even to "contend" that a statute which threatens his liberty is unconstitutional for indefiniteness or for any other reason?

The reasoning presented by appellant in support of its statement is no less incredulous than the statement itself.

It is said that the information having charged a willful violation of the statute, "there can be no doubt the Act has been violated." (Ibid.) But the question before this Court is not whether appellee has violated the statute but whether the statute violates the Constitution—a question which appellee, consistent with accepted and established procedures, most properly raised by his Motion to Dismiss.[64]

Appellant goes on ingenuously to announce "the principle that a litigant can challenge the validity of an Act only when it is applied to his own disadvantage." (P. 132, appellant's brief.) Does appellant seriously mean that the instant statute is not being applied to the disadvantage of the defendant?

We submit that appellant's long and torjuous argument merely reflects the impossibility of its task. It simply cannot prove the existence of light where darkness prevails; it simply cannot persuade that Section 506(a)(1) meets the elementary requirement of definiteness in a criminal statute creating a new offense.

B. *Equal Protection of The Laws*

The Fifth Amendment has been construed to be broad enough to include equal protection of the laws (*United States* v. *Yount*, 267 Fed. 861, 863); and, in any event, it restrains "such discriminatory legislation by Congress as amounts to a denial of due process." (*Hiroboyashi* v. *United States*, 320 U. S. 81, 100.)

We accept the rule laid down in *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580, 584, and cited by appellant (n. 35, p. 98 of appellant's brief): "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may

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[64] In the *Connally* case, supra, the issue of indefiniteness was raised on a motion to dismiss, and in the *Cohen* case, *supra*, the issue was raised on a demurrer.

be conceived to justify it." We submit that there is no state of facts that exists or that can reasonably be conceived in justification of the discrimination explicit in the Lea Act.

That statute, of course, is an attempted exercise by Congress of its constitutional power to regulate commerce. The most that can be said is that Congress had reached the conclusion that it would best serve the public policy of the interstate commerce of broadcasting for licensees to employ only "needed" workers, to broadcast foreign programs, to broadcast educational and cultural programs, and so forth. To be consistent Congress should have provided for the restraint or punishment of all persons responsible for practices in the broadcasting industry that Congress found objectionable.

If it is undesirable for unions to exercise their economic power to seek the prevention of, say, foreign broadcasts, it is, of course, equally undesirable for licensees to exercise their economic power directly to accomplish the very same thing. From the point of view of interstate or foreign commerce, which is the only criterion by which the validity of this Congressional enactment can be supported, the evil lies in what is done and not in who has done it. Obviously, the effect on interstate commerce is no less harmful where the licensee arbitrarily or for good business reasons refuses to broadcast a foreign program than where a union arbitrarily or for good economic reasons refuses to work for any licensee that does broadcast foreign programs.

The extreme discrimination worked by the statute is readily illustrated. Suppose, for example, that the American Federation of Musicians entered into a mutually advantageous agreement with the British union of professional musicians whereby the parties undertook to encourage foreign broadcasts to their respective countries. Such an agreement would, of course, be altogether consistent with one of the ostensible aims of the statute. Suppose,

too, that in furtherance of that agreement the American Federation of Musicians threatened to strike or picket any licensee that refused to broadcast a British program. That kind of economic pressure is not proscribed by the statute; indeed, it, too, would be in complete harmony with it. Yet —the licensee could, with complete impunity, disregard the union's demand, resist the pressure and refuse to broadcast the foreign programs.

Similarly, the union could strike a licensee in furtherance of a demand to broadcast educational programs or to achieve the converse of any of the objectives listed in the statute, and the licensee can lawfully refuse those demands —can successfully impose the very conditions which the union, under the statute, may not seek by the most peaceful and legitimate means.

Not only are licensees empowered under the statute to impose any of the conditions for which employees may not strike, picket or boycott, but also, it is clear that they have done so in the past for their own reasons—that is, without reference to union demands—and will continue to do so in the future. The statute itself recognizes that by expressly legitimatizing any contracts "heretofore or hereafter" made, embodying those conditions. (Subsection (c).)

Appellant attempts to meet this point with the bland assertion that "Congress could reasonably assume that an employer's normal self-interest would adequately protect the public in this respect." (P. 13, appellant's brief.) That, we submit, confounds common sense and common experience. To assert that licensees or any other group of employers have, in pursuit of their profits, demonstrated a sensitivity to the public's interest and welfare that has not at least been equalled by that of their employees is merely to articulate a prejudice that is completely without foundation in fact.

On June 18th of last year, to cite a ready example, the National Broadcasting Company of its own volition refused

a request to broadcast a program from the National Music Camp at Interlochen.[65] That refusal was just as effective, and considerably more direct, in keeping the Interlochen program from the air as anything the Musicians' Union has done or might do. Only a flagrant disregard for equal treatment would result in imposing criminal penalties on the Musicians' Union for striking against the inexpensive competition of amateurs and at the same time giving full latitude to the National Broadcasting Company to refuse to broadcast an amateur program that pays nothing, in place of a commercial program from which it would derive profit.

A broadcasting company which arbitrarily refuses to broadcast a single foreign program is not in violation of this law. Not long ago, for example, the National Broadcasting Company refused to broadcast a Toscanini program from Milan, Italy. A union of workingmen, however, faced with economic destruction by the competition of cheap foreign labor, may not, under threat of imprisonment, refuse to work for a broadcasting company which will not control and minimize that competition. That is not reasonable classification—it is discrimination to the point of being grotesque.

There is a further discrimination as between employees of the broadcasting industry and employees of all other industries that are in interstate commerce. It will not be denied that employees in such other industries have the unquestioned right to employ peaceful means in pursuance of the same or similar objectives which are denied to employees of the broadcasting industry. Nor can it be effectively denied that the attainment of those ends by employees in other industries has had a different or less substantial impact on interstate commerce.[66]

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[65] *New York Times*, June 18, 1946.

[66] On page 13 and elsewhere of its brief, appellant says that there has been no showing of similar practices in other interstate industries. We believe the Court may take judicial notice of the fact that these practices

How can it be said that it is a burden on interstate commerce for the Chicago Federation of Musicians to demand the employment of three additional employees by Station WAAF, that it is an evil to be condemned and outlawed, and that it is not a burden on interstate commerce or any evil for the same Chicago Federation of Musicians to make a similar demand on the neighboring motion picture studio or chain hotel. The truth is, of course, that it is not a greater burden on interstate commerce in the broadcasting industry than it is in the motion picture or the chain hotel industry. The truth is that Congress has given privileged and unjustified consideration to the broadcasting industry. Demands for additional employment and for all the other objectives specified in subsections (a) and (b) of the Act are made by musicians on all—licensees and others—of their employers, and similar demands are made by virtually every other union in this country on employers in interstate commerce. Legislation that singles out for criminal treatment one segment of one industry for practices that are engaged in by all segments of that industry and by all segments of all industries is unreasonably one-sided and hence repugnant to the due process clause.

There is still further discrimination in this statute as between employees other than musicians in the broadcasting industry and employees in other interstate industries. Appellant argues that Congress, because of the record before it, could meet the evil it allegedly found without encompassing all other potential evil doers. Even assuming

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are universal. See, for example, Slichter, *Union Policies and Industrial Manggement*, The Brookings Institution, 1941, and particularly Chapter 6 thereof. The chapter is styled "Make-Work Rules and Policies" and is broken down into the following sub-divisions: "Limits on Daily or Weekly Output," "Indirect Limits on the Speed of Work," "Controlling the Quality of Work," "Requiring Time-Consuming Methods of Work," "Requiring that Unnecessary Work be Done or that Work be Done More Than Once," "Regulating the Number of Men in a Crew or on a Machine or Requiring the Employment of Unnecessary Men," "Requiring that Work be Done by Members of a Given Skilled Craft," "Prohibiting Employers or Foremen from Doing Journeymen's Work."

the validity of any Congressional finding that the musicians have been engaging in excessive practices, which we flatly deny, nevertheless it would in no way justify the many severe restraints imposed by the statute on non-musician employees in the radio broadcasting industry, since it has nowhere been suggested that the activities of these employees in any way differ from those of any other employees in interstate industries.

C. *The Statute Destroys the Right to Bargain Collectively, Which is a "Liberty" Within the Meaning of the Fifth Amendment.*

The seeming preservation of the right to bargain collectively and enter into a collective agreement by subsection (c) of the statute is wholly illusory. Actually, the statute destroys the liberty of employees of licensees to enter into agreements with their employers because it demolishes that "equality of position between the parties in which liberty of contract begins." (Mr. Justice Holmes in *Coppage v. Kansas*, 236 U. S. 1, 27.)

We are not suggesting that the framers of the Bill of Rights in 1791 were thinking of collective bargaining when they devised and adopted the Fifth Amendment, but "provisions of constitutions are vital, not formal. Their significance is to be gathered not simply by taking the words of the dictionary, but by considering their origin and *the line of their growth.*" (Mr. Justice Holmes in *Gompers v. United States*, 233 U. S. 604, 610. (Italics supplied.) The growth of collective bargaining has been such that today, we submit, it is clearly subsumed by the word "liberty" in the Fifth Amendment. In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 33, the Court recognized the constitutional statute of collective bargaining when it said:

> "That [the right to bargain collectively] is a *fundamental* right. Employees have as clear a right to or-

ganize and select their representatives for lawful purposes as the employer has to organize his business. Long ago we have said that labor organizations were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; if the employer refused to pay him the wages he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; union was essential to give laborers opportunity to deal on an equality with their employer."[67] (Italics supplied.)

The essence, of course, of any bargain is the granting of some valuable right which the bargaining parties may otherwise lawfully withhold. Manifestly, the only things of value which employees have to offer to their employers are their skill and energy. Under elementary principles of justice and in consonance with the universal practice attending negotiation of all manner of contracts they should be allowed to withhold their skill and energy. The instant statute says, in one breath, that agreements embodying specified conditions may be entered into by licensees and their employees, but in the next it takes away from those employees the only effective means they have of negotiating such agreements. The following comments of Senator La Follette in the course of the debate forcefully show how this statute deprives employees of licensees of their liberty to bargain collectively:

> "The Senator from Vermont stated that the prohibitions in the specified category would deprive anyone in the future from using his collective bargaining power, and ultimately his right to strike, if necessary, in negotiating a new contract . . . As I understand, . . . when the time comes to negotiate new contracts . . .

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[67] "The right of employees to organize for collective bargaining . . . and to unite for concerted action in other respects is now so clearly recognized as a *fundamental* right that citation is superfluous." (*National Labor Relations Board* v. *Ford Motor Co.*, *supra*, p. 913.) (Italics supplied.)

> artists' and writers' guilds will not be in the same position in which they were when they negotiated their contracts in the first place . . . They would be prohibited from using their collective bargaining power or their right to strike if the broadcasting company refused to incorporate such a provision in a new contract . . . The ultimate power which gives a union or a guild any economic power in relation to the employer is its collective right, if it cannot obtain terms and conditions which it thinks equitable and just, to refuse to work any longer for the employer. . . . The point is that we would deprive these people of the right to quit work collectively, which is the right of all other employees in the United States. As a result, when they came to renegotiate their new contracts . . . the prohibitions contained in this measure would prevent them from using the right and the power which they had when the contract was negotiated this year . . . When the time came to renegotiate the contract they would be deprived of that right; and . . . then all the companies could simply say, 'Oh, well, that is prohibited. We are not going to have that in the contract.' All the companies could get together and agree about that. There is nothing in the measure to prohibit them from banding together and saying, 'Since Congress has made this unlawful, we will not even enter into negotiations about it with you.' "[68]

Our national policy on labor relations is predicated upon the recognition of the self-evident fact that the individual employee cannot effectively bargain with his employer; that only through combination and collective action can equality of bargaining power be attained.

In *American Steel Foundries* v. *Tri-City Central Trades Council, supra,* Chief Justice Taft laid down that basic principle, which has since been incorporated in Congressional legislation. He said (p. 209):

> "They [labor organizations] were organized out of the necessities of the situation. *A single employee was helpless in dealing with an employer.* He was de-

[68] 92 Cong. Rec. 3251.

pendent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. *Union was essential to give laborers opportunity to deal on equality with their employer.* They united to exert influence upon him and *to leave him in a body in order by this inconvenience to induce him to make better terms with them.* They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital." (Italics supplied.)

Judge Sackmann, Judge of the District Court in and for the City and County of Denver, Colorado, eloquently stated the same proposition in *American Federation of Labor v. Reilly*, 7 Labor Cases, 65:

"It is emphasized that none of the plaintiff labor organizations, or those whom they represent, are engaged in any business for profit; that the members of said unions, having only the brawn of their muscles, the strength of their bodies, the alertness of their minds, the skill of their hands, and general ability of the average human being with which to support and maintain themselves and their families under a standard of living worthy of this great civilized Republic and constitutional government of the United States; because of the weakness and futility of individual action in a country like ours to obtain justice, fair treatment, careful and just consideration and solution of these vital problems and constitutional rights, have united themselves into labor organizations commonly called unions to obtain these just rights and benefits by collective bargaining; that they are, like religious organizations and political associations, simply groups of individuals gathered together and assembled together for the more effective exercise through joint action of the constitu-

tional rights to which each individual American citizen is entitled and may lawfully exercise jointly to obtain just hours, wages, working conditions and American standards of living for themselves and their families; . . ."

Section 2 of the Norris-LaGuardia Act, 29 U. S. C. A., Chap. 6, provides in part as follows:

> "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract* and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . ." (Italics supplied.)

And the "Findings and Policy" of Section 1 of the National Labor Relations Act (49 Stat. 449), too, refers to "the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association."

The above authorities recognize what is undisputably true, that only by collective action can employees enjoy liberty of contract. Collective bargaining, if it is to mean anything, must include the right to collective withdrawal from work, the right to strike. By removing that right, the statute destroys collective bargaining in violation of the Fifth Amendment.

Conclusion

The Lea Act is, we submit, a direct assault on free trade unionism. For the first time in our history workingmen who resort to their traditional and peaceful methods to improve their economic standards and to obtain agreements that are admittedly lawful are declared criminal and subjected to long imprisonment and heavy fines. Never

before has Congress passed legislation that is so blatant an attempt to throw the full sovereign force of our national government in support of the owners of a single favored industry and in opposition to the workingmen and women in that industry.

There are deep, challenging economic problems in the broadcasting industry which have caused the difficulties that have eventuated in this statute. Neither the licensees nor the Congress have sought to understand and meet those problems in a constructive manner. Instead, the broadcasting industry has deliberately set up a bogeyman trap and Congress has, unfortunately, been ensnared. The result has been a piece of legislation which makes not an inch of progress in resolving the economic problems of the industry, but, rather, invokes principles and applies techniques that confound common justice and flout the basic principles of our Constitution. This legislation flies in the face of the calm and wise advice given by President Truman when he vetoed the Case Bill:[69]

> "Our problem in shaping permanent legislation in this field is to probe for the causes of lockouts, strikes and industrial disturbances. Then, to the extent possible, we must eliminate these causes. *Strikes against private employers cannot be ended by legislative decree. Men cannot be forced in a peacetime democracy to work for a private employer under compulsion.* Therefore strikes must be considered in the whole context of our modern industrial society. They must be considered in the light of inflationary pressures, of problems of full employment, of economic security.
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> "Legislation governing industrial relations is workable only when carefully considered against this broad background." (Italics supplied.)

It is respectfully submitted that Section 506, Federal Communications Act of 1934, as amended, is, for the rea-

[69] *Washington Post*, June 12, 1946, p. 12.

sons hereinbefore set forth, unconstitutional and that the judgment of the Court below should therefore be sustained.

JOSEPH A. PADWAY,
HENRY KAISER,
HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.

HENRY A. FRIEDMAN,
521 Fifth Avenue,
New York, New York.

DAVID KATZ,
175 West Washington Street,
Chicago, Illinois.
Counsel for Appellee.

APPENDIX A

The following letter is set forth on page 7 of hearings before the subcommittee of the Senate Committee on Interstate Commerce, 77th Congress, 2nd Session, pursuant to S. Res. 286, *Use of Mechanical Reproduction of Music*, 1942:

July 30, 1942.

Mr. James L. Fly, Chairman,
Federal Communications Commission,
Washington, D. C.

Dear Mr. Fly:

In answer to your inquiry of July 22nd as to our objection to the broadcast of the National High School Orchestra of Interlochen, Mich., and also in answer to many press releases reportedly coming from you in the matter of canned music, I will give you the entire picture.

First of all, the American Federation of Musicians welcomes a fair and impartial investigation of any of its past actions and whatever actions it may take in the future.

It has been stated in the press that I personally am the "czar" and that these actions are charged to me personally. This is not so. The American Federation of Musicians has a convention every year, and *this has taken place consecutively for the past forty-seven years.* The Federation action on canned music was taken by its convention in 1941 at Seattle, Washington, by unanimous vote of 518 delegates, representing locals of the United States and Canada. It was referred to our International Executive Board to be put into effect, and the subsequent acts were directed by that Executive Board. I did only what the convention and the Executive Board directed.

There are thousands, not hundreds, of school bands and orchestras, and these school bands and orchestras in 90 per cent of the cases receive instruction from members of the American Federation of Musicians. In Interlochen the conductors are also members of the American Federation of Musicians. The fact that the Interlochen band was on the

air for some twelve years shows plainly that we were not opposed to these boys and girls being on the air. However, Interlochen is not in as good a position as other school bands and orchestras, because Interlochen is a commercial proposition while in public schools throughout the country the children receive their tuition free. That is not the case at Interlochen where these children pay $275.00 for a period of eight weeks, plus additional fees for private lessons and other items. The fees paid by some of the pupils exceed $400.00 per season of eight weeks. This, in my opinion, puts the school squarely on a commercial basis. Radio advertisers pay the musicians and all other participants a commercial price for advertising their commodities, and the same rule should apply to this school.

That is not the sole reason for the Federation's protest; it is also necessary for the self-protection of the professional musician. Since the outbreak of the war, Army and Navy bands are on the air any number of times each day. This of course you can easily understand has taken up much music time on the air, so much so that the American Federation of Musicians was beginning to wonder whether there was going to be any work left for the professional musician. It is easy to understand that the more free music the radio stations receive, the less need for the professional. That was the primary reason for opposing the broadcasting of the concerts from Interlochen. It will be a sorry day for the professional musician if two-thirds of the air time is taken up by non-professionals. You must remember that this already is an over-burdened profession. In some of our locals unemployment reaches 60 per cent; in some 75 per cent; and in other locals as high as 90 per cent. If this continues, there will be no incentive for our children to become professional musicians, because after having studied for many years they will find themselves in a starving profession. These same children in Interlochen may become professionals ten years from now, when they and their families will resent other children taking away their bread and butter, under the guise of educational purposes.

The originating programs emanate from New York, Chicago and Los Angeles. Each of these three locals has

closed shop conditions with the broadcasting networks, in spite of which the American Federation of Musicians in many cases has not objected to school bands and orchestras going over the air occasionally.

Many of the school boys and girls studying music, and many of them at Interlochen, are sons and daughters of members of the American Federation of Musicians, and if the fathers of these children are not able to make a living, then the children could not get an education because there would be no money to pay for same.

It has been said that if they do not go over the air there would be no incentive to study music. What incentive did the good old-time musicians have when they studied music in years gone by when there was no radio? In my opinion, that is not a good argument. I understand that these children in Interlochen rehearse all week for one program, but again I say, the broadcast is intended to commercialize the Interlochen Camp.

Let us see what the American Federation of Musicians has done for the happiness of the home in supplying good music. Today, as in the past, its symphony orchestras are permitted to go over the air without any charge to the broadcasting companies. Its name bands are also permitted to go over the air without any extra charge to the broadcasting companies. The final result is that the public gets the benefit. I can truthfully say that for every dollar the broadcasting companies pay for musicians they receive $4.00 worth of music gratis. Keep in mind now that I am speaking of the professional musicians, members of the American Federation of Musicians. Is this not a contribution to our great country and musical culture?

It has been said in the press that I am a "czar" and "dictator," and that the only music that goes over the air is the kind of music permitted by me. This I say is not true. You must be aware of the fact that some eighteen months ago the broadcasting companies told the public that they would not hear American Society of Authors, Composers and Publishers (ASCAP) music, and therefore the public did not hear ASCAP music for nine months. In this case, the finest writers and the finest music were

taken off the air because the broadcasting companies said "NO." Because of the ASCAP-Radio fight, some of our conductors who have music libraries worth as much as $100,000.00 were prevented from playing their music over the air. Was this fair to the public?

I personally received my musical education in the Hull House School in Chicago, which in those days was conducted by Miss Jane Addams. I was one of the members of the school band. From there I went to the Chicago Daily News Band; so I came from the amateur school, like many other professional musicians of today, and we did not play over the radio. In those days we were not used under the guise of education to commercialize someone's institution.

I was very much surprised to read in the press release your reference to the colored question. The white and colored members of the American Federation of Musicians have worked together since its inception. As far as I know there has never been any discrimination against our colored members. However, I welcome investigation of this matter by anyone.

I also read in a press release, supposedly coming from you, that if we stopped the making of recordings and transcriptions, 500 radio stations and many taverns and cafes which cannot employ musicians, will be put out of business. There are some 500,000 juke boxes in the United States and Canada. These juke boxes alone have taken the jobs of approximately 8,000 live musicians. There are approximately 500 radio stations which do not employ a single live musician. These radio stations are all classified as big business. They say they need the services of the American Federation of Musicians, but only in the canned kind of music. This part of our business takes away several thousand more musicians who would be employed if we did not make the canned music, to say nothing about the taverns and cafes using Muzak, recordings, etc.; etc.

Members of the American Federation of Musicians received $3,000,000.00 annually for making canned music. This $3,000,000.00 worth of canned music, when distributed around the United States and Canada, takes the place of

live musicians who would receive for their work approximately $100,000,000.00. Certainly no one can say this is a healthy condition.

It is said that without our assistance these places would go out of business. The question is, who shall go out of business first? It is not our intent to put anyone out of business. Why can't we all live? Why should all big revenues go into the pockets of these radio stations, officials and others, without paying one dollar to the musicians?

The action of the convention of the American Federation of Musicians in stopping recordings was not taken on the impulse of the moment. It was taken after some fifteen years of deliberation, when the patience of the entire 138,000 members of the American Federation of Musicians was exhausted. Again I repeat, this was not the action of the President of the American Federation of Musicians; it was the action of the entire membership of the Federation.

It may be surprising to the public to know that 95 per cent of the music in the United States and Canada heard today is canned music. Only 5 per cent is left for the poor professional musician who studied all his life so that he might make a living for his family. This is not a question of being a "czar" or a "dictator." It is a question of a large group of men fighting for their very existence.

Insofar as I personally am concerned, and as long as I am the President of the American Federation of Musicians, I shall encourage such action on the canned music situation until such time as these people who are getting rich on our services while our people get no money, see fit to employ members of the American Federation of Musicians.

I will cite one case pending at this very moment. A strike was called on the Ringling Brothers Circus last June 1st, for a mere increase of $2.50 per man per week. The show included fourteen colored musicians and twenty-six white musicians. These men have been out of a job ever since June 1st, because the circus bought records *made by our members*. These records are now playing the show. In other words, our own men are scabbing on our men. Would anyone say this is a healthy condition? If we had not made these records, these forty men would not be walk-

ing the streets without jobs. I would like to have someone point out to the Federation any worker in any other line of business who makes the instrument which puts himself out of business. Incidentally, the circus offered to settle this strike by taking back the white musicians, and eliminating the colored musicians; but we said the white as well as the colored men went out together, and it was only fair that they go back together.

The ice man was put out of business because the frigidaire was installed in the home; but the ice man had nothing to do with the making of the frigidaire. Many, many other labor saving devices have been created where the displaced worker had nothing to do with the making of same. In our case, it is entirely different. We make the instrument which puts us out of business. To continue this policy means suicide for the musicians of the United States and Canada.

Not one recording or transcription company has approached the American Federation of Musicians with any suggestion to overcome this problem.

They sit back and say, "we will all combine—the radio stations, recording companies, advertising agencies—and we will bring pressure on Washington to fight our battles for us." That is just what has been done. While the Government is spending its good time and money protecting all these interests who have combined against the American Federation of Musicians, irrespective of any action taken, the American Federation of Musicians must protect itself with its own resources. This is very unfair. Am I to assume that these companies are lily-white, and are not to be investigated in the same manner as the American Federation of Musicians in this controversy? No agency, not even the agencies of the Government, has asked the American Federation of Musicians to explain the situation. All we have been getting are threats through the press that unless we do this, that or the other thing, we are going to have this or that done to us. The American Federation of Musicians resents any thought in the minds of any one questioning the patriotism of that organization or its members. No organization has bought more War

Bonds pro rata than have the members of the American Federation of Musicians. Until now, the American Federation of Musicians has O.K.'d millions of dollars', I repeat, millions of dollars' worth of music to be played free for the armed forces of the United States and its Allies, and will continue to do so. Insofar as breaking down the morale of our fighting men is concerned if we do not make records, I repeat now what I said at our convention last June 8th, that we will make recordings and transcriptions for the armed forces of the United Nations, and we will make any records requested by the President of the United States.

But we cannot make canned music for commercial industries which are getting rich while the musicians walk the streets without jobs. We will not permit any industry to hide behind the Nation's Flag, and place our members on relief rolls, while they continue to use the product made by us to deprive our members of the American way of living, and to raise their families in the democratic American way.

Mr. Fly, I hope that the above is the information that you desire. I am ready and willing at all times to be helpful to you and the Commission whenever you request. I will be very happy to furnish you with any further information desired.

Sincerely yours,

JAMES C. PETRILLO, President,
American Federation of Musicians.

(Seal)

APPENDIX B

The following letter is set forth on page 85 of hearings before the subcommittee of the Senate Committee on Interstate Commerce, 77th Congress, 2nd Session, pursuant to S. Res. 286, *Use of Mechanical Reproduction of Music*, 1942:

July 31st, 1942.

Mr. Elmer Davis, Director,
Office of War Information,
Washington, D. C.

My Dear Mr. Davis:

In answer to your letter to me of July 28th, 1942, please note that my pledge to the President of the United States and the People of the United States, continued in my letter of December 27th, 1941, to which you refer, will be kept by the American Federation of Musicians.

You say in part in your letter:

> "I am informed that if you enforce this edict three direct consequences will be the elimination of new electrical transcriptions for the use of radio stations, the elimination of new popular records for so-called 'juke boxes,' and the elimination of new popular and classical records for home consumption. I am further informed that this move in all probability will lead to court fights, possible strikes, and definitely curtailed musical service to the public in the critical months ahead—months which may well decide the fate of this country's war effort."

Electrical transcriptions for radio used as intended—once only—are not detrimental to the American Federation of Musicians if destroyed after such use. The proof of this is that some three weeks ago the World Broadcasting Company requested, and was promptly given permission, to make such electrical transcriptions for a period of twenty-six weeks for General Motors' employees working in our defense industries.

Members of the American Federation of Musicians will not play for the making of records for juke boxes. The juke box industry is strictly commercial, producing tremendous revenues for all interested parties except musicians. No soldier or civilian is allowed to hear that music without putting five cents in the machine. If a soldier has ten dances it costs him fifty cents. Most of the ballrooms of the country for an admission charge of twenty-five cents furnish excellent orchestras for all-night dancing.

I can tell by your letter that you have been absolutely misinformed throughout. You say that the American Federation of Musicians' action will stop popular-classical records for home consumption. This is not so. The musicians will make records for home consumption. At our Convention last June it was announced that the musicians will make recordings for the Armed Forces of the United States and its Allies; that they will make recordings for home consumption and will make recordings at the request of the President of the United States. Those promises will be kept.

I am sending you under separate cover a copy of the communication under date of July 30th, 1942, from us to Mr. James Lawrence Fly, Chairman of the Federal Communications Commission, on canned music, which will give you a clear picture. Believing you to be fair, I am sure you will realize after reading same that the American Federation of Musicians is justified in its action on canned music.

The American Federation of Musicians has a membership of 138,000. We did not request our members to send letters to Senators, Congressmen and different Department heads in Washington. We stand squarely on the merits of the issue and will meet it in the open on that basis. The radio interests, recording companies and other agencies connected with this controversy have circularized many Senators, Congressmen and Department heads in Washington with letters to bring pressure on the American Federation of Musicians. Can you imagine the letters that 138,000 members could send to Washington? We have not urged our people to do anything of that sort.

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The American Federation of Musicians stands second to none when it comes to patriotism. Not only do our name bands play gratis for the Armed Forces of America, but these same orchestras play for bond sales throughout the different cities in the United States without compensation and without any cost to the Government.

On April 1st, 1942, I received a communication from Nelson A. Rockefeller, Coordinator of Inter-American Affairs, requesting permission to record programs played by union musicians over radio broadcasts, such records to be sent to Latin-America. That request was promptly complied with. The point I would like to make is that Mr. Rockefeller stated that if the Government had to pay for these programs, it would cost $1,000,000.00. This approval was given to the Government without any compensation whatsoever. To quote Mr. Rockefeller's own language:

"It would mean that the United States Government would have to pay over a million dollars."

American Federation of Musicians' members have been working gratis in campaigns for the raising of money for the Navy and Army Relief, Russian Relief, Red Cross, etc.

They are cooperating 100 per cent with the Treasury Department in making recordings of radio studio bands without receiving any compensation from the Government. Their services are also used by the Treasury Department in the selling of War Bonds, all without any compensation, which means that they can record and dub recordings. These recordings can then be distributed to the different radio stations in the United States. The musicians have also donated their live talent to the Treasury Department without any compensation.

The United States Department of Agriculture inaugurated ten dramatic programs for the Soil Conservation and National Defense. We approved their request to re-record this music so that it could be sent to other stations without any compensation.

We are cooperating wholeheartedly with the Department of Justice in many of the foreign language radio programs.

I repeat and confirm the following from my letter of December 27th, 1941:

> "To this new slogan, this new theme for the new year, then, the Federation dedicates itself: *Music For Morale.*"

You have made an appeal to me. I am only a messenger for 138,000 musicians who have, through their Convention, ordered the step taken by the American Federation of Musicians in the recording situation. Realizing that our Government comes first, if we thought for one moment we were doing anything to hurt morale, you may rest assured that the American Federation of Musicians would not stand in the way. Our record proves that.

We refute any suggestion that we are lacking in patriotism. We will not permit hypocrisy on the part of the interests who are fighting us to hide behind the American Flag, which Flag belongs not only to a few but to all Americans, including the musicians who are striving to earn a livelihood.

The above does not begin to tell the entire story as to how far the American Federation of Musicians and its Locals are cooperating with the United States Government.

I cannot grant your request to cancel the notice that the American Federation of Musicians' members will not play for transcriptions or records. That notice, however, does not apply to recording for the Armed Forces of the Nation or for the President of the United States.

The American Federation of Musicians will continue to cooperate with the various Governmental Departments as heretofore with respect to free music. We will do the same for the War Department, the Navy Department, the Marine Corps, the Coast Guard, the Office of Civilian Defense and the Office of War Information.

Sincerely yours,

JAMES C. PETRILLO, President,
American Federation of Musicians.

APPENDIX C

Why Foreign Broadcasts Must Be Regulated

The following article appears in the March, 1946, issue of the *International Musician:*

In reaffirming the regulation of foreign broadcasts of musical programs the American Federation of Musicians is acting to protect the economic interests of its membership in the United States and Canada in a manner that is entirely consistent with the traditional and approved policies and practices of this country as well as those of foreign countries. It requires no extensive elaboration to demonstrate that, should foreign musical broadcasts be unregulated, then the standards and conditions of the United States and Canadian musicians would be directly threatened and eventually undermined. It would become the simple situation of high standard American labor being exposed to the overwhelming competition of low standard foreign labor.

That competition is the underlying basis of our whole pattern of foreign trade relations. Every tariff law that has been enacted by Congress has been motivated and justified by the natural desire to protect the American investor, the American farmer, and the American worker against the ravages of such competition.

Similarly, largely at the direct insistence of organized labor, Congress has for many years now adopted and implemented a policy of severe restrictions on immigration. Here, again, the plain objective has been the preservation of employment opportunities and standards of the American worker.

If it is desirable and necessary to limit and regulate the number of persons who may lawfully immigrate into this country, how much greater the desirability and necessity of regulating foreign musical broadcasts. Where persons come to this country they are at best a very small minority. They are not disposed to tear down American wage standards because there is a natural tendency on their part to

seek the wages and standards prevailing in this country; also the American worker has the opportunity of controlling the situation since the workers are resident in America. The American worker can and does effectively insist that the employer maintain the same conditions for the immigrant worker as obtained for the American worker. Such, of course, is hardly the situation as respects the competition of foreign broadcasts. It goes without saying that the American Federation of Musicians cannot and will not exercise any influence over the standards and wages of foreign musicians working in foreign lands. And, since the working standards and wages of the American musician are infinitely superior to those of any foreign musician, and since the foreign musician can render his services in any American home without leaving his native land, it follows directly and irrefutably that foreign musical broadcasts constitute the most striking instance of unregulated competition between high American and low foreign standards.

Neither the general problem, nor the methods of meeting it, are, as I have already shown, by any means new. It is interesting to note, however, that as long ago as 1917 the Congress of the United States took action with respect to this problem as it specifically affects the musician. The Act of February 5, 1917, flatly prohibited the entry of contract laborers. Thereafter, and in order to make it crystal clear that musicians came within the provisions of that act, Congress enacted an amendment providing:

> "The contract labor provisions of the immigration laws shall be applicable to alien instrumental musicians, whether coming for permanent residence or for a temporary period"

So far as the American musician is concerned there is, of course, no difference whatever between contracting for a foreign band to appear in person in this country and contracting for a foreign band to broadcast to this country. In both instances the foreign musician is displacing the American musician. Both the language and policy of the

above quoted law completely support the recent action of the American Federation of Musicians in connection with the regulation of foreign musical broadcasts.

Nor is the principle in America unique. All countries faced with the same problem resort to the same or similar measures of self-protection. England, for example, protects its film industry by imposing a definite quota on American films and requires that specific percentages of money be spent for British labor in the making of British films compared with the labor cost of American imported films. Moreover, England, France and other democratic countries go even farther than the United States in their control of foreign labor. Any immigrant who comes to the United States within the established quotas may proceed to work at any job he can find. In European countries, however, immigrants must obtain governmental permits before they are entitled to work. And those permits are never issued where the result would be the work displacement by those immigrants of citizens of those countries.

For the foregoing reasons the International Executive Board reaffirmed its position with respect to foreign broadcasts.

It seems strange, indeed, to contrast the wide-spread support of our traffic and immigration policies with the artificial furore which has been manufactured by the press over the Federation's recent action which merely reestablished the conditions existing prior to the war. Actually, it is not so strange at all. It is but an extension of the bitter and highly financed publicity campaign launched by those employers of musicians who have fought the progress of the American Federation of Musicians in improving the conditions of its members every inch of the way. And throughout that bitter and unscrupulous campaign truth and consistency have never been adhered to.

JAMES C. PETRILLO, President,
American Federation of Musicians.

APPENDIX D

Extract from Report of Proceedings of Sixty-Second Annual Convention of the American Federation of Labor:

Supplemental Report of the Executive Council

The Executive Council submits the following declaration for consideration and action by this convention:

For a period of years the American Federation of Musicians has been engaged in a labor dispute with manufacturers of records and transcriptions, and with broadcasting companies over practices of the said employers, which have caused the unemployment of thousands of musicians affiliated with the American Federation of Musicians. The employers have not shown a disposition to resolve this important controversy and it became necessary for the members of the American Federation of Musicians to cease work in the making of records and electrical transcriptions. By unanimous action of a duly accredited convention of the American Federation of Musicians, held at Seattle, Washington, June, 1941, its President was directed to inform all members of the American Federation of Musicians to cease work in the making of records and electrical transcriptions. As a result of such order of the convention, the Anti-Trust Division of the Department of Justice has instituted a suit against the American Federation of Musicians in an effort to further the individual economic views of the head of said department, which views threaten the destruction of free trade unionism and have been previously repudiated by the decisions of the Supreme Court of the United States.

The civil suit instituted by the Anti-Trust Division of the Department of Justice unfairly aids employers in their arbitrary resistance to a fair and equitable solution of the dispute. The objectives sought by the Anti-Trust Division of the Department of Justice would prohibit the use of peaceful measures in labor disputes, would deny the exercise of freedom of speech, and would impose involuntary servitude upon the workers of the country. Therefore,

the American Federation of Labor condemns the Anti-Trust Division of the Department of Justice for its persistent campaign to destroy constitutional rights of a free and democratic labor movement. The American Federation of Labor gives unqualified support to the American Federation of Musicians in its just struggle to protect the skill and employment opportunities of its members from the destructive inroads made by the arbitrary and unrestricted competition of labor displacing mechanical devices which the Musicians are continually called upon to help to manufacture with the result of destroying their own employment opportunities, which, without their help, could not be done.

American Federation of Musicians

Resolution No. 68—By Delegate C. J. Haggerty, California State Federation of Labor.

WHEREAS, The American Federation of Musicians in convention assembled in Seattle, Washington, during the month of June, 1941, did instruct the International President James C. Petrillo and the Executive Board of the American Federation of Musicians to make certain decisions regarding the making of records and electrical transcriptions by members of the American Federation of Musicians, the unauthorized use of which have completely eliminated musicians' jobs where they previously existed, and

WHEREAS, Pursuant to this demand on the part of the rank and file membership of the American Federation of Musicians through the duly authorized and accredited delegates to the convention representing 145,000 organized musicians in the United States and Canada, the International President of the American Federation of Musicians, James C. Petrillo, at the convention of the A. F. of M. held in Dallas, Texas, June 6th, 1942, expressed the will of the aforesaid 145,000 members of the A. F. of M. by decreeing that on and after August 1, 1942, the members of the

A. F. of M. would cease the making of recorded music and electrical transcriptions except for the use of the armed forces of our country, for non-commercial use in the home, or at the request of the President of the United States, and

WHEREAS, The distortions and glaring inaccuracies by a section of the Press have confused the public mind for the deliberate purpose of creating disunity and to discredit organized labor's part in the war effort despite the fact the American Federation of Musicians has every just reason to be proud of the inestimable record of occasions on which the locals and members comprising the Federation have donated freely of their time and money to the armed service, in the sale of war bonds, in Red Cross drives and everything connected with the war effort in general, therefore, be it

RESOLVED, That the American Federation of Labor in convention assembled expresses its confidence in the judgment of the International President of the American Federation of Musicians, James C. Petrillo, and the 590 accredited delegates to the Dallas Convention of the A. F of M. in their back-to-the-wall endeavor to retain the last vestige of employment for the union musicians, and be it further;

RESOLVED, That copies of this resolution be sent to Senator Clark of Idaho, Chairman of the Senate Investigating Committee, C. C. Fly, Chairman of the Federal Communications Commission, Elmer Davis, Chairman of the Office of War Information, James C. Petrillo, President, American Federation of Musicians.

Report of Committee

The American Federation of Musicians has for many years suffered severely because more than half of its one hundred and thirty-eight thousand members are unemployed. This unemployment is due, chiefly, to the fact that records and electrical transcriptions are being used in the

transmission of musical entertainment to the public to such a degree that ninety-five per cent of all music heard today in the United States and Canada is what is commonly known as "canned music." Only five per cent is played by live musicians.

While a tremendous industry has sprung up in the use of music through the radio, and hundreds of millions of dollars are derived by these companies as a result of the use of music, very little of this return comes to the musicians because of the use of mechanical devices for the transmission of the music. The companies engaged in the manufacture of records and in the broadcasting industries find it profitable to dispense with the use of live musicians and to use these mechanical devices in connection with great advertising enterprises.

The American Federation of Musicians has for many years sought a solution to this unemployment problem. The manufacturers and broadcasting companies have shown no disposition to find ways and means whereby the unemployment created by their industry can be alleviated to a degree which would be fair and equitable.

Thus the employment and income of musicians are steadily decreasing while that of the record manufacturers and broadcasting companies is growing in staggering proportions. All the musicians have sought is a sensible and reasonable solution to the problem. All they want is that the employer assume a portion of the burden and examine the problem with a view of finding ways and means whereby the industry may go on but that the musician may live.

The American Federation of Musicians, at its convention held June, 1941, in Seattle, Washington, unanimously voted to direct its president to inform its members that they shall cease work in the manufacture of records and electrical transcriptions. This direction has been put into force and effect; and, as a result, the employers in these industries, the press and the Anti-Trust Division of the Department of Justice have "ganged up" on the American Federation of Musicians and launched one of the most vicious campaigns in labor history in order to prevent a just and equitable solution of the problem.

The Anti-Trust Division of the Department of Justice has instituted a suit for an injunction, the purpose of which is to compel the musicians to make records upon any terms and conditions fixed by the employers.

No regard is shown by the Anti-Trust Division for the injustice perpetrated upon the musicians by the record manufacturers. No regard is shown for the policy so frequently expressed by the government in recent years—that unemployment must be averted. No consideration is given to the fact that the musician in this instance is called upon to make the device which contributes to his destruction.

The attention of your Committee has been directed to the testimony given by Mr. Arnold, head of the Anti-Trust Division, before the Committee of the United States Senate, which undertook to launch an investigation of the action taken by the Convention of the American Federation of Musicians.

The Committee's attention has also been directed to the brief compiled by Mr. Arnold in the suit which he has brought against the American Federation of Musicians. In that brief, there appears the following startling statement:

> "In summary, we submit that the phrase 'terms or conditions of employment' assumes that there is a master who directs the work and a servant who obeys those directions. The function of the master is to determine what work he wants done, what machines he will use, what goods or services he will furnish, and the customers to whom he will sell those goods and services. In so far as the servant demands the power to determine any of these questions he is no longer a servant. He has become the master. He is an entrepreneur in business. A union cannot, under the pretext of improving terms or conditions of employment, use organized coercion to destroy the right of the employer to conduct his business in an efficient way and to use his best judgment as to the goods he will sell, the customers to whom he will sell them, and his relationship with other independent organizations . . ."

That statement has not been extracted from an ancient text justifying the institution of slavery. Nor is it the solemn observation of one who lived in that period of history when the very word "union" was anathema, and those workers who dared to join together into unions, vicious and ignominious criminal conspirators.

That statement is made by one who presumes to speak for the United States of America. It was published only a few days ago, on October 1st, 1942. And thus, at last, is frankly disclosed the true and vicious sentiments of this great crusader.

Are there words that can and will describe the indignity and insult thus heaped upon every man and woman in this country contributing their skill and energies in this war—in this war to end the tyranny implicit in the phrase "There is a master who directs the work and a servant who obeys those directions?"

You know that the true spokesmen and interpreters of the policies of our country could not even have thought, much less printed, a concept so directly subversive to the institution of democracy. The right of free men and women not to obey the arbitrary directions of a master is the very essence of our democratic institution.

We say, with full awareness of the implications of this statement, that Mr. Arnold's comment injects a dangerous, discordant and disuniting note in the concerted efforts of our public war officials to achieve full and enthusiastic production for the war effort.

If there be any merit or substance to Mr. Arnold's comments, then the efforts of organized labor to obtain greater voice in shaping the policies and methods of law constitute a violation of law. If there be any merit or substance to Mr. Arnold's comments, then every constructive suggestion made by any American worker, or by any American union for a proper use of the masters' machines is in violation of law. If there be any merit or substance to Mr. Arnold's comments, then the entire effort of the War Production Board to establish joint labor management production committees is a violation of the law. If there be any merit or

substance to Mr. Arnold's comments, then the workers of this country, lest they be exposed to prosecution—and persecution—by Mr. Arnold, must stand by in mute and servile silence while their so-called masters—blind to the public needs of war, and driven only by desire for profits—abuse and exploit their machines and their "servants" to their own selfish ends. Such is the dictum of Assistant Attorney General, Thurman Arnold.

Thus, the controversy is much broader and more comprehensive than an isolated dispute with the American Federation of Musicians. It involves a principle affecting the rights of all organized labor. Only by the vigorous support of the American Federation of Musicians can the establishment of this ruthless, undemocratic and unjust principle be averted.

Therefore, your Committee recommends the adoption of the Supplemental Report of the Executive Council and Resolution No. 68.

Vice-President Wolf moved the adoption of the committee's report.

The motion was seconded and carried by unanimous vote.

SUPREME COURT OF THE UNITED STATES

No. 954.—October Term, 1946.

The United States of America, Appellant, v. James C. Petrillo.	Appeal From the District Court of the United States for the Northern District of Illinois.

[June 23, 1947.]

Mr. Justice Black delivered the opinion of the Court.

The District Court dismissed a criminal information filed against the respondent, James C. Petrillo, on the ground that the statute on which the information was founded was unconstitutional. 68 F. Supp. 845. The case is here on direct appeal by the Government as authorized by the Criminal Appeals Act. 18 U. S. C. Supp. V § 682. The information charged a violation of the Communications Act of 1934, 48 Stat. 1064, 1102, as amended by an Act of April 16, 1946, — Stat. —. The specific provisions of the Amendment charged to have been violated read:

"Sec. 506. (a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—

"(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services; or

. . . . . .

"(d) Whoever willfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by imprisonment for not

more than one year or by a fine of not more than $1,000, or both." Pub. L. No. 344, 79th Cong., 2d Sess.

The information alleged that a radio broadcasting company, holding a federal license, had, for several years immediately preceding, employed "certain persons who were sufficient and adequate in number to perform all of the actual services needed . . . in connection with the conduct of its broadcasting business." The information further charged that the respondent, Petrillo, "wilfully, by the use of force, intimidation, duress and by the use of other means, did attempt to coerce, compel and constrain said licensee to employ and agree to employ, in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services . . . ."

The coercion was allegedly accomplished in the following manner:

"(1) By directing and causing three musicians, members of the Chicago Federation of Musicians, theretofore employed by the said licensee in connection with the conduct of its broadcasting business, to discontinue their employment with said licensee;

"(2) By directing and causing said three employees and other persons, members of the Chicago Federation of Musicians, not to accept employment by said licensee; and

"(3) By placing and causing to be placed a person as a picket in front of the place of business of said licensee."

The only challenge to the information was a motion to dismiss on the ground that the Act on which the information was based (a) abridges freedom of speech in contravention of the First Amendment; (b) is repugnant to the Fifth Amendment because it defines a crime in

terms that are excessively vague, and denies equal protection of the law and liberty of contract; (c) imposes involuntary servitude in violation of the Thirteenth Amendment.[1] The District Court dismissed the information, holding that the 1946 Amendment on which it was based violates the First, Fifth, and Thirteenth Amendments.

Two general principles which concern our disposition of appeals involving constitutional questions have special application to this case: We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity. The reasons underlying this principle and illustrations of the strictness with which it has been applied appear in the opinion of the Court in *The Rescue Army* v. *Municipal Court*, 331 U. S. —, —, and cases there collected. And in reviewing a direct appeal from a District Court under the Criminal Appeals Act, *supra*, our review is limited to the validity or construction of the contested statute. For "The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, 308 U. S. 188, 193.

First. One holding of the District Court was that, as contended here, the statute is repugnant to the due process clause of the Fifth Amendment because its words, "number of employees needed by such licensee," are so vague, indefinite and uncertain that "persons of ordinary intelligence cannot in advance tell whether a certain action or course of action would be within its prohibition . . ." The information here, up to the place where it specifically charges the particular means used to coerce the licensee, substantially employs this statutory language. And the motion to dismiss on the ground of vagueness and indefi-

[1] Another ground, not argued here, was that the Act represents an exercise of power by Congress not delegated to the United States.

niteness squarely raises the question of whether the section invoked in the indictment is void *in toto*, barring all further actions under it, in this, and every other case. *Cf. United States* v. *Thompson*, 251 U. S. 407, 412. Many questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and, sometimes, proof. *The Rescue Army* v. *Municipal Court*, *supra*; *Watson* v. *Buck*, 313 U. S. 387, 402. *Borden's Company* v. *Baldwin*, 293 U. S. 194, 204; 210, and concurring opinion at p. 213. But no refinement or clarification of issues which we can reasonably anticipate would bring into better focus the question of whether the contested section is written so vaguely and indefinitely that one whose conduct it affected could only guess what it meant. Consequently, since this phase of the appeal raises a question of validity of a statute within our jurisdiction under the Criminal Appeals Act, *supra*, and is ripe for our decision, we turn to the merits of the contention.

We could not sustain this provision of the Act if we agreed with the contention that persons of ordinary intelligence would be unable to know when their compulsive actions would force a person against his will to hire employees he did not need. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; *Lanzetta* v. *New Jersey*, 306 U. S. 451. But we do not agree. Of course, as respondent points out, there are many factors that might be considered in determining how many employees are needed on a job. But the same thing may be said about most questions which must be submitted to a fact-finding tribunal in order to enforce statutes. Certainly, an employer's statements as to the number of employees "needed" is not conclusive as to that question. It, like the alleged wilfullness of a defendant, must be decided in the light of all the evidence.

Clearer and more precise language might have been framed by Congress to express what it meant by "number of employees needed." But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose. The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. If this argument should be accepted, the result would be that no legislature could make it an offense for a person to compel another to hire employees, no matter how unnecessary they were, and however desirable a legislature might consider suppression of the practice to be.

The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. *Robinson* v. *United States*, 324 U. S. 282, 285–286. It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. See *Screws* v. *United States*, 325 U. S. 91; *United States* v. *Ragen*, 314 U. S. 513, 522, 524, 525. The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently

definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more.

Second. It is contended that the statute denies equal protection of the laws to radio-broadcasting employees as a class, and, for this reason, violates the due process clause of the Fifth Amendment. This contention, raised by the motion to dismiss, and sustained by the District Court as a ground for holding the statute unconstitutional as written; is properly before us, and we reach this equal protection ground, for the same reason that we decided the question of whether the section was unconstitutionally vague and indefinite.

In support of this contention it is first argued that if Congress concluded that employment by broadcasting companies of unneeded workers was detrimental to interstate commerce, in order to be consistent, it should have provided for the punishment of employers, as well as employees, who violate that policy.[2] Secondly, it is argued, the Act violates due process because it singles out broadcasting employees for regulation while leaving other classes of employees free to engage in the very practices forbidden to radio workers. But it is not within our province to say that because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. Consequently, if Congress believes that there are employee practices in the radio industry which injuriously affect interstate commerce, and directs its prohibitions against those practices, we could not set aside its legislation even if we were persuaded that employer practices also required regulation. See *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46. Nor could we strike down such legislation, even if we

[2] The Act does not prohibit radio broadcasters from voluntarily hiring more employees than they need.

believed that as a matter of policy it would have been wiser not to enact the legislation or to extend the prohibitions over a wider or narrower area. Here Congress aimed its law directly against one practice—compelling a broadcasting company to hire unneeded workers. There is nothing novel about laws to prohibit some persons from compelling other persons to act contrary to their desires. Whatever may be the limits of the power of Congress that do not apply equally to all classes, groups, and persons, see *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584, we are satisfied that Congress has not transgressed those limits in the provisions of this statute which are here attacked.

Third. Respondent contends here, and the District Court has held, that the statute abridges freedom of speech by making peaceful picketing a crime. It is important to note that the statute does not mention picketing, peaceful or violent. The proposed application of the statute to picketing, therefore, does not derive from any specific prohibition written into the statute against peaceful picketing. Rather it comes from the information's charge that respondent attempted to compel the licensee to hire unneeded employees by placing "a picket in front of the place of business of (the) . . . licensee." Yet the respondent's motion to dismiss was made only on the ground that the statute, as written, contravenes the First Amendment. In ruling on this motion, the District Court assumed that because "there was no charge of violence, . . . the placing of a picket must be regarded . . . as peaceful picketing." From this assumption, it concluded that "the application [of the statute] here sought to be made violates the First Amendment by its restriction upon freedom of speech by peaceful picketing." Thus, rather than holding the statute as written to be an unconstitutional violation of the First Amendment, the District Court ruled on the statute as

it was proposed to be applied by the information as it then read.

We consider it inappropriate to reach the merits of this constitutional question now. As we have pointed out, we have consistently said that we would refrain from passing on the constitutionality of statutes in advance of the necessity to do so. And the provisions for direct appeal from District Courts of certain criminal cases do not require us to pass on constitutional questions prematurely decided by a district court's dismissal of an information.

The information here, up to the place where it alleges the use of particular coercive means, charges in substantially the language of the statute that respondent coerced the licensee. The information's charges up to this point constitute a sufficient basis for a challenge to the statute on the ground that it contravenes the Constitution. Whether this part of the information, or the information as a whole, was adequate definitely to inform the respondent of the nature of the charge against him is another question. See *United States* v. *Lepowitch*, 318 U. S. 702, 704; *Potter* v. *United States*, 155 U. S. 438; *cf. United States* v. *Hess*, 124 U. S. 483. Had the District Court postponed ruling on the First Amendment question raised by the motion to dismiss, or had it denied the motion, respondent could have sought a bill of particulars, apart from attacking the constitutionality of the Act. See *Husty* v. *United States*, 282 U. S. 694, 702; *Bartell* v. *United States*, 227 U. S. 427, 433–434; *Dunbar* v. *United States*, 156 U. S. 185, 192. So also, if the additional allegations describing the means used to accomplish the proscribed purpose were not definite enough for the court to determine whether they were sufficient in law to charge an offense, and if such allegations were not mere surplusage, see *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 222, a challenge could have been

made to the information, see *United States* v. *Hess*, *supra*, at 487–488, as distinguished from a challenge to the statute on which it rested. In that event, and upon a holding of insufficiency of the information, appeal by the United States would have properly gone, under the Criminal Appeals Act *supra*, to the Circuit Court of Appeals, and if inappropriately brought here, that Act, as amended, 56 Stat. 271, would have required us to transfer the cause to the Circuit Court of Appeals. But no such challenge was made to the information.

We therefore have a situation in which we are urged to strike down a statute as violative of the constitutional guarantees of free speech when the statute has not been, and might never be, applied in such manner as to raise the question respondent asks us to decide. For the gist of the offense here charged in the statute and in the information is that respondent "wilfully, by the use of force, intimidation, duress *and* by the use of other means, did attempt to coerce, compel and constrain" [1] the licensee to hire unneeded employees. If the allegations that this prohibited result was attempted to be accomplished by picketing are so broad as to include action which either is not coercive, compelling or constraining, within the statute's meaning, or could not be constitutionally held to be, the trial court would be free, on motion of the respondent, to strike the particular allegations if they are surplusage. Rules of Criminal Procedure, § 7 (d). Or the Government might amend the information "at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." *Ibid.* § 7 (e).

The foregoing analysis shows that we are asked to rule on constitutional questions that are not yet precisely in issue. The question as it was decided by the District

[1] Italics supplied.

Court, was not the question raised by the motion to dismiss—whether the statute is invalid on its face—but whether it is invalid as it is proposed to be applied. And even if our decision could be evoked upon a showing that the statute, certainly, but for our intervention, would have punished respondent for peaceful picketing, there is no such certainty here. No final issue had been drawn. The information was still subject to amendment to fit, within the permissible area of amendments, the type of coercive means developed by further pleading or proof. See *Borden's Co.* v. *Baldwin*, *supra*, at 213. Further pleadings and proof might well draw the issues into sharper focus making it unnecessary for us to decide questions not relevant to determination of the constitutionality of the statute as actually applied. Thus this case had not reached a stage where the decision of a precise constitutional issue was a necessity. Consequently, we refrain from considering any constitutional questions except those concerning the Act as written. We do not decide whether the allegations of the information, whatever shape they might eventually take, would constitute an application of the statute in such manner as to contravene the First Amendment. We only pass on the statute on its face; it is not in conflict with the First Amendment.

Fourth. The District Court held, and it is argued here, that the statute, as sought to be applied in the information, violates the Thirteenth Amendment which prohibits slavery and involuntary servitude. This contention is also rooted in that part of the information which particularizes the means by which respondent attempted to compel action by the licensee, *i. e.*, by causing three musicians to discontinue, and three musicians not to accept, employment. The argument is that employees have a constitutional right to leave employment singly, see *Pollock* v. *Williams*, 322 U. S. 4, 17, 18, or in concert, and con-

sequently that respondent cannot be guilty of a crime for directing or causing them to do so. For the reasons given with reference to the picketing specification, therefore, we consider the Thirteenth Amendment question only with reference to the statute on its face. Thus considered, it plainly does not violate the Thirteenth Amendment. Whether some possible attempted application of it to particular persons in particular sets of circumstances would violate the Thirteenth Amendment is a question we shall not pass upon until it is appropriately presented.

Reversed and remanded.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

pp. 2 3

SUPREME COURT OF THE UNITED STATES

No. 954.—October Term, 1946.

The United States of America, Appellant, v. James C. Petrillo.	Appeal From the District Court of the United States for the Northern District of Illinois.

[June 23, 1947.]

Mr. Justice Frankfurter, concurring.

I agree with the Court's judgment and opinion because it holds that the Lea Act is not beyond the power of Congress to regulate commerce. I desire, however, to add a few words.

The constitutional basis for the legislation is the same as that upon which the validity of the Sherman Law rests. It is too late in the day to require argument or citation of cases in support of the right of Congress to free interstate commerce from obstruction that the exertion of monopolistic power may entail or from interference that may reasonably be deemed to promote monopoly. Equally clear is it that Congress may direct its legislation specifically towards a disclosed evil, without generalizing its prohibition, when in its judgment like evils have not disclosed themselves elsewhere. It would be a usurpation of the legislative authority for us to find that there was no basis in reason for the judgment of Congress that the public interest called for legislation to deal with what is colloquially called "featherbedding" in connection with the broadcasting business. Beyond that, it is not our province to go.

The District Court took a different view, and on defendant's motion dismissed this information on the ground that the statute is unconstitutional. 68 F. Supp. 845. Since the Court now holds that the statute is constitutional, the case goes back to the District Court.

The Court conjures up difficulties which I do not entertain. The case is here under the Criminal Appeals Act of 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. V, § 682, whereby a direct review can be had of a district court judgment setting aside an indictment or information, if the decision of the district court is based "upon the invalidity or construction of the statute upon which the indictment or information is founded." Our decisions have construed this to mean that review can be had here only if a district court's decision was based exclusively upon the invalidity or construction of a statute. A criminal case cannot be reviewed here if questions of criminal pleading—defects not arising from the statute under consideration—enter into a decision sought to be reviewed. See *United States* v. *Hastings*, 296 U. S. 188, 192, 194; *United States* v. *Borden Co.*, 308 U. S. 188, 193; *United States* v. *Swift & Co.*, 318 U. S. 44. If both the sufficiency of criminal pleading and the validity or construction of the underlying statute were in issue before the District Court, and views as to both were interwoven in the court's decision, this Court has no jurisdiction to entertain the appeal. Under the Act of May 9, 1942, it must remand the cause to the appropriate circuit court of appeals. On the other hand, if the question of constitutional construction was the isolated ground of decision by a district court dismissing a federal prosecution, that is the only question to be considered here and it must be considered within the scope given it by the district court. Other questions may be imbedded in the case which may eventually come to the surface. But they are not to brought to the surface here under the limited, specific review given by the Criminal Appeals Act. It is to such implicit questions of pleading, and to statutory or constitutional questions not passed upon by a district court, that Mr. Chief Justice Hughes

had reference when he said, "The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, *supra*, at 193.

There is no complication in the record before us to an exercise of our jurisdiction under the Criminal Appeals Act. The District Court's decision is wholly free from any ruling involving criminal pleading. He stated precisely what he deemed to be the sole issue before him and which alone he decided: "The only question before the court is the constitutional aspect of this statute as it was written by Congress. On this question the court is of the opinion that this statute is unconstitutional for the reasons above stated." 68 F. Supp. at 850.

We, therefore, have no acknowledgment or intimation by the District Judge that he had any difficulty with the information as a matter of pleading or that it carried any ambiguities which he resolved one way rather than another. If that were so, we would have no jurisdiction to review his decision. The District Court found constitutional defects in the statute "as it was written by Congress." We find the contrary. Therefore, the information should go back to the District Court for disposition. Just as we cannot go behind a district court's determination regarding the sufficiency of the indictment as a matter of pleading as a preliminary to passing on statutory validity, so, when a naked question of validity is presented to us, it is not for us to scrutinize the charge and hypothesize possibilities whereby new questions may arise of a statutory or constitutional nature.

SUPREME COURT OF THE UNITED STATES

No. 354.—October Term, 1946.

The United States of America, Appellant, v. James C. Petrillo,	Appeal From the District Court of the United States for the Northern District of Illinois.

[June 23, 1947.]

Mr. Justice Reed, dissenting.

I dissent from the opinion and judgment of the Court. My reason for disagreement is that § 506 (a) (1) of the Communications Act is too indefinite in its description of the prohibited acts to support an information or indictment for violation of its provisions. My objection is not to the words in the first paragraph of § 506 that make unlawful in labor matters the use of threats, force, violence, intimidation or duress against an employer. There is a background of experience and common understanding that ordinarily gives such words, when used in criminal statutes, sufficient definiteness to acquaint the public with the limits of the proscribed acts. When such words are used, they place upon those affected the risk of estimating incorrectly the sort of action that may ultimately be held to violate the statutes. *Nash* v. *United States*, 229 U. S. 373.

My objection is to the indefiniteness of the statutory description of the thing for which force must not be used—that is, "to compel" a licensee under the Communications Act "to employ . . . any person or persons in excess of the number of employees needed by such licensee to perform actual services."

This criminal statute is the product of legislation directed at the control of acts deemed evil by Congress. It is one of the many regulatory acts that legislative bodies have passed in recent years to make unlawful certain

practices in the field of economics that seemed contrary to the public interest.[1] These statutes made new crimes. Deeds theretofore not subject to punishment fall within the general scope of their prohibition. Common experience has not created a general understanding of their criminality. Consequently, in order to adequately inform the public of the limitations on conduct, a more precise definition of the crime is necessary to meet constitutional requirements.[2]

Anglo-American law does not punish citizens for violations of vague and uncertain statutes. There is no place in our criminal law for acts defined as detrimental to the interests of the state. A statute is invalid when "so vague that men of common intelligence must necessarily guess at its meaning." 269 U. S. at 391. It seems to me that this vice exists in this section of the challenged act. How can a man or a jury possibly know how many men are "needed" "to perform actual services" in broadcasting? What must the quality of the program be? How skillful are the employees in the performance of their task? Does one weigh the capacity of the employee or the managerial ability of the employer? Is the desirability of short hours to spread the work to be evaluated? Or is the standard the advantage in take-home pay for overtime work?

The Government seeks to avoid the difficulty by interpreting the section. Their brief says, after considering the legislative history, "the bill was not intended

[1] Emergency Price Control Act, 56 Stat. 33, § 205 (b), 50 U. S. C. App. § 925 (b); Fair Labor Standards Act, 52 Stat. 1069, § 16 (a), 29 U. S. C. § 216 (a); National Labor Relations Act, 49 Stat. 456, § 12, 29 U. S. C. § 162; Federal Corrupt Practices Act, as amended, 57 Stat. 167, § 9, 50 U. S. C. App. § 1509.

[2] *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Connally* v. *General Construction Co.*, 269 U. S. 385. *See Gorin* v. *United States*, 312 U. S. 19, 26.

to apply to mere differences of opinion as to whether men were overworked; it only fits deliberate demands for payment to additional employees made in complete disregard for the employer's need and without any justification from the viewpoint of actually getting the employer's business done. . . . If Paragraph (1) is read in its context, along with the succeeding paragraphs, it is clear what Congress was driving at when it characterized the Act as one to prevent extortion, as distinct from *bona fide* demands relating to conditions of employment." This interpretation seems to me to fly in the face of § 506 (1). There is another subsection to which the language might apply.[3] This clearly defines the prohibited acts. If the Congress wishes to fix the maximum number of employees that a licensee may employ in stations of various sizes, it may, of course, be done. Or, if it is impractical for Congress to act because of the varying situations, the number may be left to regulations of the Federal Communications Commission or other regulatory body.

This is a criminal statute. The principle that such statutes must be so written that intelligent men may know what acts of theirs will jeopardize their life, liberty or property is of importance to all. That principle requires, I think, a determination that this section of the Communications Act is invalid.

MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join in this dissent.

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[3] Pub. No. 344, 79th Cong., 2d Sess., 47 U. S. C. 506, § 506 (a) (4): "to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensee, which are not to be performed;"